IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1978

**No. 78-1391**

CHATEAU X, INC., a South Carolina Corporation; ATLA THEATERS, INC., a South Carolina Corporation; JAMES RUSS, individually and in his capacity as an officer of both Chateau X, Inc. and ATLA Theaters, Inc.; ALBERT PELOQUIN, individually and in his capacity as an officer of both Chateau X, Inc. and ATLA Theaters, Inc.; HECTOR RIQUELME, JR.; FREDERICK OLLIE BYROM; SUSAN RUPE; VICTOR STROOP; JIMMIE TUCKER HILL; DENISE TERRY LAMB; GEORGE JOHNSON; JOE HORNSBY; ROBERT JEROME SMITH; and a place of business known as Chateau X Theater and Bookstore, Highway 17 South, Jacksonville, North Carolina,

*Petitioners,*

v.

STATE OF NORTH CAROLINA, EX REL WILLIAM H. ANDREWS, District Attorney for the Fourth District of North Carolina,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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*Petitioners,*

v.

STATE OF NORTH CAROLINA, EX REL WILLIAM H. ANDREWS, District Attorney for the Fourth District of North Carolina,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina entered January 4, 1979.

### CITATION TO OPINION BELOW

This Petition seeks review of the North Carolina Supreme Court decision in the case of *State of North Carolina ex rel Andrews v. Chateau X, Inc., et al.,* 296 N.C. 251, ____ SE2nd ____ (1979), which appears in the Appendix to this Petition.

## STATEMENT OF JURISDICTION

The judgment of the North Carolina Supreme Court was entered on January 4, 1979. Jurisdiction to review this judgment by Writ of Certiorari is conferred on this Court by Title 28, United States Code, §1257(3).

## QUESTION PRESENTED

Whether an injunction against the future sale of "obscene materials", as that term is defined by state law, represents an unconstitutional prior restraint on rights guaranteed to the Petitioners by the First and Fourteenth Amendments to the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment or religion or prohibiting the free exercise thereof; or



abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Amendment XIV

§1. Citizenship defined - privileges of citizens - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner Chateau X, Inc. is a South Carolina Corporation licensed to do business in the State of North Carolina and operating a place of business in Jacksonville, North Carolina. At that location, Petitioner Chateau X, Inc. owns and operates a bookstore and arcade which disseminates to consenting adults material of an explicit sexual nature. The other Petitioners are officers and employees of this place of business. On December 12, 1977, Respondent, the District Attorney for the Fourth Judicial District of North Carolina, filed a complaint against the Petitioners. This Complaint alleged that the Petitioners were maintaining a business for the purpose of exhibiting and selling to the public obscene films and publications as a regular and predominant course of the Petitioners' business. The Respondent's Complaint named certain materials being disseminated by the Petitioners. The Respondent further alleged that the

Petitioners were selling other material which was similar to that named in the Complaint. Respondent's Complaint alleged that the actions of the Petitioners constituted a nuisance pursuant to Chapter 19 of the North Carolina General Statutes and asked that Petitioners' business be declared a nuisance and be perpetually enjoined from operating anywhere within the State of North Carolina. Respondent also requested the destruction of the materials specified in his Complaint.

On December 12, 1977, the same day on which the Respondent filed his Complaint, the Onslow County Superior Court issued a Temporary Restraining Order enjoining the Petitioners from removing or interfering with any property on the premises of their business and ordering them to make a full accounting of all transactions involving "lewd" or "obscene matter." On December 20, 1977, counsel for the Petitioners filed a motion to dismiss or continue the action. This motion was based on the pendency of an action in the Federal District Court for the Eastern District of North Carolina in which the constitutionality of the North Carolina nuisance law was being challenged. This motion was denied.

The Court, on December 30, 1977, issued a preliminary injunction which essentially enjoined the dissemination of all of Petitioners' stock-in-trade. This injunction enjoined all future sales of "obscene and lewd matter" as those terms are defined by the North Carolina Obscenity Law. As a result of this injunction, Petitioners closed their place of business. It has remained closed since that date. On January 4, 1978, Petitioners filed their Answer, as well as a Motion to Dismiss Respondent's Complaint. The motion alleged that the North Carolina Nuisance Statute, as well as the relief requested by the Respondent, violated the First and Fourteenth Amendments to the United States Constitution. Petitioners further contended that, since theirs was the only adult business in



the City of Jacksonville against which Respondent had brought suit, the statute was being enforced against Petitioners in an unconstitutionally arbitrary manner and, thus, had violated their equal protection guarantees. The Court denied this motion on the same day it was filed.

Trial was held on January 4 and 5, 1978, and resulted in a judgment rendered on January 13, 1978. At trial, Petitioners cited the Court to a ruling handed down by the Federal District Court for the Eastern District of North Carolina on January 4, 1978. This opinion, *Fehlhaber v. North Carolina,* 445 F.Supp. 130 (EDNC 1978) held the North Carolina Nuisance Statute unconstitutional in several respects, including those raised by the Petitioners. Nonetheless, the state court again refused to dismiss the case against Petitioners and granted relief contrary to the Federal Court ruling.

In its judgment, the state trial court held that all the material specified in Respondent's Complaint was "lewd, obscene and a nuisance." The Court then ordered Petitioners enjoined from the dissemination of the specified materials and ordered the destruction of these materials. Further, the Court enjoined the Petitioners from:

> Possessing for exhibition to the public illegal, lewd matter consisting of films which appeal to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:
>
> (1) Persons engaging in sodomy, per os, or per anum
>
> (2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or
>
> (3) Persons engaging in masturbation.

and from

Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books and papers which appeal to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation.

Petitioners appealed this judgment to the North Carolina Court of Appeals. That Court granted a by-pass so that the appeal might be heard by the North Carolina Supreme Court. In this appeal, Petitioners raised numerous constitutional issues, all based on the United States Constitution. Petitioners challenged both the procedural and substantive constitutionality of the North Carolina Nuisance Statute and also argued the constitutional legitimacy of the trial court's injunction order. Petitioners contended that the statute constituted an unconstitutional prior restraint on activities protected by the First and Fourteenth Amendments because it provided for the effective closing of a business based on prior sales of obscene material. Petitioners also contended that the trial court's injunction order against future sales of "obscene material" violated Petitioners' First and Fourteenth Amendment rights by imposing an unconstitutional prior restraint upon them. Petitioners further argued that the trial court's injunction order was unconstitutionally overbroad because it failed to require that the material to be enjoined in the future be judged by contemporary community standards or be patently offensive.



The North Carolina Supreme Court affirmed the trial court by a four-to-one vote with two members not participating. In so doing, the Court did not rule on Petitioners' claim that the North Carolina Nuisance Statute was unconstitutional. However, it did note that, if the challenged provisions did constitute an unconstitutional prior restraint, those portions would be severable from the remainder of the statute. The Supreme Court held that the trial court's incorporation of the North Carolina Obscenity Law cured any infirmities in its injunction by imposing the legal test for obscenity upon the Petitioners. Finally, the North Carolina Supreme Court ruled that an injunction against future dissemination of "obscene material" did not constitute an unconstitutional prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. The one dissenting justice opined that the trial court's injunction against future sale of "lewd matter" "contravened the freedom of speech and freedom of the press clauses of the First Amendment as applied to the states under the Fourteenth Amendment" and noted that "this is the kind of prior restraint against future expression which the United States Supreme Court has consistently and rightly determined to be inconsistent with the guarantees of the First Amendment." (Appendix, p. ).

## REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH A RULING OF THE NORTH CAROLINA FEDERAL DISTRICT COURT IN THE SAME SUBJECT MATTER AND WITH THE DECISIONS OF OTHER FEDERAL AND STATE COURTS.

The ruling of the North Carolina Supreme Court which Petitioners seek to review stands in direct contradiction to rulings of several other state courts and of two recent federal court decisions, both of which are now on appeal. Most criti-

cal is the friction between the ruling below and a decision rendered by the Federal Court for the Eastern District of North Carolina in *Fehlhaber v. North Carolina,* 445 F.Supp. 130 (EDNY 1978). In *Fehlhaber,* a group of adult businesses brought suit against the State of North Carolina, its Attorney General and a local District Attorney to challenge the validity of a 1977 enactment, Ratified Bill Chapter 819. This law, which became GS 19-1 et seq. amended prior public nuisance law to provide civil remedies for the "illegal possession or sale or obscene matter." During the pendency of the *Fehlhaber* case, Respondent brought the instant action against Petitioners pursuant to that statute.

Among the claims asserted by the Plaintiffs in *Fehlhaber* was an attack on the injunctive provisions of the nuisance law. Those provisions are contained in §19-5 of the Act which provides that, once the state has established that a business has sold any obscene material:

> An order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from maintaining the nuisance at the place complained of . . . Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

Plaintiffs in *Fehlhaber* argued that this section provided for an unconstitutional absolute closing of a business based on a sale of a single piece of obscene material. In support of this claim, Plaintiffs cited §19-2.1 which allowed an action "to enjoin the use of any structure or thing adjudged to be a nuisance under this chapter." Defendants contended that the challenged statute only allowed an injunction to be directed against the specific material deemed obscene. The *Fehlhaber* Court rejected both interpretations and held that:



> The clear meaning of Section 19-5 is that upon a finding that a book store or moviehouse is a nuisance because it substantially or regularly trades in obscene materials, the superior court judge must enjoin the further distribution by the particular proprietor of any books or movies falling within the statutory definition of lewdness.
>
> 445 F.Supp. at 137.

The issue, thus, became whether the statute could constitutionally provide for an injunction against all future sales of "obscene matter" as that phrase is defined by the North Carolina obscenity law.

The *Fehlhaber* Court ruled that the statute could not so provide. Any such injunction, the Court held, would constitute an unconstitutional prior restraint on activity presumptively protected by the First Amendment. In so ruling, the *Fehlhaber* Court stated:

> Numerous courts have struggled diligently with the applicability of these basic principles to a state's efforts to regulate obscenity through civil nuisance procedures. Seven state supreme courts have invalidated injunction provisions of civil nuisance statutes analogous to North Carolina's as overbroad prior restraints . . . The commentators are similarly unanimous.
>
> * * *
>
> The equation of prior restraint with subsequent punishment ignores basic principles rooted in our jurisprudence since Blackstone. While the government may be able subsequently to punish those who engage in unprotected speech, only in exceptional circumstances may the same

speech (in this case, the dissemination of books and movies) be enjoined before it occurs.

* * *

That particular speech may be outside the parameters of the First Amendment and thus punishable criminally provides no theoretical basis for enjoining the speech before its occurrence.
*Id.* at 139 (Citations omitted)
(Footnote omitted)

The *Fehlhaber* Court issued a declaratory judgment that §19-5, the injunction procedure of the nuisance law, was unconstitutional as not being strictly limited to specified materials and as constituting an unconstitutional prior restraint on future dissemination of presumptively protected speech materials. The state appealed the *Fehlhaber* ruling to the Fourth Circuit Court of Appeals, and this appeal is presently pending. Although Petitioners cited the *Fehlhaber* decision to the North Carolina Supreme Court, the majority opinion of that Court neither discussed nor distinguished that ruling.

More recently, in *Universal Amusement Co., Inc. v. Vance,* ——— F.2d ——— (5th Cir. #75-4312, decided December 18, 1978) the Fifth Circuit Court of Appeals adjudicated the same issue in a manner consistent with the *Fehlhaber* ruling and contrary to the holding of the North Carolina Supreme Court. In that case, the Fifth Circuit had originally ruled that an injunction against future dissemination of "obscene material" did not constitute an unconstitutional prior restraint. *Universal Amusement Co., Inc. v. Vance,* 559 F.2d 1286 (5th Cir. 1977). The Court, however, granted an En Banc rehearing to reconsider this holding. On rehearing, the Court reversed its earlier ruling and held that:



An order banning the exhibition of unnamed 'obscene' films would prohibit the showing of films that have not been judicially declared obscene, as well as, films that may not have even been produced . . . An injunction that forbids the showing of any film portraying a particular act enumerated in the obscenity statute suppresses future films because past films have been deemed offensive . . . We therefore hold that Article 4667(a)(3) is unconstitutional insofar as it authorizes injunctions against the future exhibition of unnamed films. Such a broad injunction simply cannot stand, for it amounts to a prior restraint on materials not yet declared obscene (Citations omitted)

The Defendants in *Universal Amusement Co., Inc. v. Vance,* have appealed the Fifth Circuit decision to this Court.

In addition to conflicting with these two Federal Court opinions, the opinion below rejected the rulings of eight state Supreme Courts all of which manifestly and uniformly invalidated the same type of injunction which the North Carolina Supreme Court upheld. Indeed, every state Supreme Court which has considered this question has ruled that any injunction against future sales of "obscene material" and any statute which allows for such an injunction violate First and Fourteenth Amendment protections against unconstitutional prior restraints on speech activity. *Parish of Jefferson v. Bayou Landing, Ltd.,* 350 So. 2d 158 (La. 1977); *New Riviera Arts Theater v. State ex rel Davis,* 219 Tenn. 652, 412 SW2d 890 (1967); *Ranck v. Bonal Enterprises, Inc.;* 467 Pa. 569, 359 A.2d 748 (1976); *People ex rel Busch v. Projection Room Theater,* 17 Cal.3rd 42, 130 Ca.Rptr. 328, 550 P.2d 600 (1976) cert. den. 429 U.S. 922, 97 S.Ct. 320, 50 L.Ed.2d 289 (1976); *Sanders v. Georgia,* 231 Ga. 608, 203 SW2d 153 (1974); *State ex rel Sweeton v. General Corporation,* 294 Ala. 657, 320 So.2d 668 (1975) cert. den. 425 U.S. 904, 96 S.Ct. 1494, 47 L.Ed.2d 753 (1976); *State v. A*

*Motion Picture entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Mitchem v. State ex rel Schaub,* 250 So.2d 883 (Fla. 1971).

This Petition presents three factual postures which have traditionally served as a basis for this Court's grant of certiorari review. First, the ruling below has created a clear friction between the North Carolina State and Federal Courts. This Court provides the only forum in which this friction can be alleviated. Second, a conflict between decisions of the highest courts of several states on a federal question has proven to be cogent ground for this Court's review. This is especially so with regard to the validity under the Federal Constitution of a state statute common to these various states. *Fuller v. Oregon,* 417 U.S. 40, 42, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Third, the conflict between the North Carolina Supreme Court and the Fifth Circuit Court of Appeals provides a further basis for granting review of either decision. See *Katzinger v. Chicago Metallic Mfg. Co.,* 329 U.S. 394, 67 S.Ct. 416, 91 L.Ed. 374 (1947).

2. THE COURT BELOW ERRONEOUSLY APPLIED SIGNIFICANT UNITED STATES SUPREME COURT PRECEDENT

In holding that the injunction against Petitioners did not constitute an unconstitutional prior restraint, the Court below relied heavily on its determination that this Court's opinion in the landmark case of *Near v. Minnesota ex rel Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931) was inapplicable to the regulation of explicit sexual material. Based on this determination, the Court below held that the trial court's injunction against future sales of "obscene material" was specific enough to avoid self-censorship and was "in effect nothing more than a personalized criminal statute against selling certain obscene material that is directed toward the Defendants because they sold illegal matter in the past." (Appendix, P. )



These holdings are patently erroneous. Neither this Court nor any other court has ever held that the precepts promulgated in *Near* are inapplicable to civil procedures involving explicit sexual material. In *Near,* this Court invalidated a statute which allowed for the restraint of future publications based on a finding that the publication, in the past, had presented "malicious, scandalous and defamatory" matter. This Court stated that "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Id.* at 716. The North Carolina Supreme Court cited language in the *Near* opinion in which the Court stated "on similar grounds, the primary requirements of decency may be enforced against obscene publication" in holding that the rigid requirements against prior restraints established by the *Near* decision were inapplicable to the injunction against Petitioners.

Later opinions of this Court make it manifest that the quoted language referred to restraints against specific material brought before a trier of fact and deemed obscene by that trier of fact and not to material which was neither specified nor deemed obscene. This distinction between a restraint based on a judgment that specific material is obscene and a prior restraint without such an adjudication is clearly drawn in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, l L.Ed.2d 1469 (1957). In the *Kingsley Books* case, this Court upheld a New York statute from the law invalidated in *Near v. Minnesota.* This Court did not distinguish the *Near* case on the basis that the statute in *Near* did not involve regulation of explicit sexual material. Rather, the law adjudicated in *Kingsley Books* was upheld because "it studiously withholds restraint upon matters not already published and not yet found offensive." 345 U.S. at 445. Later, in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), this Court, in approving a Georgia injunctive procedure, stressed that:

> Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. *Id.* at 55 (Footnote omitted)

The injunction upheld by the Court below does not studiously withhold restraint on future speech and unconstitutionally places the burden of self-censorship upon the Petitioners. The challenged injunction places upon Petitioners the burden of determining the obscenity *vel non* of every piece of material which they desire to sell. As such, Petitioners are required to make a determination which courts and legislatures have been unable to make for two and one-half decades. The problem of defining obscenity has been termed "intractable", *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 704, 88 S.Ct. 1304, 20 L.Ed.2d 225 (1968) (Harlan J., Concurring and Dissenting). Several justices of this Court have conceded that efforts to do so must ultimately fail. See e.g. *Miller v. California,* 413 U.S. 15, 37, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (Douglas J., Dissenting); *Paris Adult Theater I v. Slaton, supra,* 413 U.S. at 73 (Brennan J., Dissenting); *Smith v. United States,* 431 U.S. 291, 311, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977) (Stevens J., Dissenting). Courts and commentators alike have recognized the extraordinary difficulty in promulgating standards which are intelligible enough to provide uniform notice to the public and guidance to the judiciary by which they may perform the delicate job of delineating between protected and unprotected speech. See e.g. Note, *The Overbreadth Doctrine,* 83 Harv.L.Rev. 844, 883-890 (1970), Note, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept,* 21 UCLA L.Rev. 181 (1973).



This Court has stressed that:

> The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finally drawn. *Speiser v. Randall,* 357 U.S. 513, 525, 78 S.Ct. 1332, 2L.Ed.2d 1460 (1958).

Petitioners are required to draw this fine line. Petitioners must make their own determination as to what contemporary community standards may be applicable, whether any given material may appeal to a prurient interest in sex, to what group that material might appeal and whether the material might be patently offensive. The result of such self-censorship is clear and was condemned by this Court in *Smith v. California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), *reh.den.* 361 U.S. 950, 80 S.Ct. 399, 4 L.Ed.2d 383 (1959). As this Court noted in that case, the evil of self-censorship is that public access to speech matter would be restricted to those materials which booksellers had inspected and found to be safe from any liability. As this Court noted:

> The booksellers' self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene would be impeded. *Id.* at 154.

The result of forcing those such as Petitioners to make such an impossible determination and to censor themselves is vividly demonstrated by Petitioners' response to the challenged injunction. As a result of the injunction, Petitioners' store has remained closed since December, 1977, and remains closed today.

For this very reason, this Court has imposed strict limits on all injunctions against dissemination of presumptively protected speech. As prior restraints, such injunctions must

come before a reviewing court bearing a heavy presumption against their constitutional validity. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The Court below completely ignored this presumption and failed to impose it upon the state. Instead, the North Carolina Supreme Court based its judgment on a theory which has been manifestly rejected by this Court. The Court below relied on the proposition that an injunction against future expression which, by statutory definition, would be violative of state law posed no greater threat to protected speech than statutes which impose criminal sanctions against those engaged in such described expression. This Court has long rejected this argument and has placed more severe restrictions on civil injunctions than on criminal proscriptions:

> A presumption against prior restraints is heavier — and the degree of protection broader — from that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: A free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others before him. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)

A threat of criminal sanctions after publication may chill speech but a prior restraint will freeze such speech. *Nebraska Press Association v. Stuart,* 427 U.S. 539, 559, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

Thus, the Court below violated clear precedent from this Court by misapplying the doctrine of prior restraint, applying the same standards for prior restraints as for criminal sanctions and by failing to impose the strict burden against prior restraints required by this Court.



## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of North Carolina.

Respectfully submitted,

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# APPENDIX

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1978

STATE OF NORTH CAROLINA, EX REL WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH DISTRICT OF NORTH CAROLINA

v.

CHATEAU X, INC., a South Carolina Corporation; ATLA THEATERS, INC., a South Carolina Corporation; JAMES RUSS, individually and in his capacity as an officer of both Chateau X, Inc. and ATLA Theaters, Inc.; ALBERT PELOQUIN, individually and in his capacity as an officer of both Chateau X, Inc. and ATLA Theaters, Inc.; HECTOR RIQUELME, JR.; FREDERICK OLLIE BYROM; SUSAN RUPE; VICTOR STROOP; JIMMIE TUCKER HILL; DENISE TERRY LAMB; GEORGE JOHNSON; JOE HORNSBY; ROBERT JEROME SMITH; and a place of business known as Chateau X Theater and Bookstore, Highway 17 South, Jacksonville, North Carolina.

No. 23 - ONSLOW

Appeal by defendants and cross-appeal by the State from Small, J., at the 4 January 1978 Session of Onslow Superior Court.

On 12 December 1977 the State, through William H. Andrews, District Attorney for the Fourth District, filed a complaint against defendants, a South Carolina corporation doing business in Jacksonville, North Carolina and its officers and employees. The complaint alleged that defendants maintained a business, Chateau X Theater and Bookstore, for the purpose of illegal exhibitions and sales to the public of obscene and lewd films and publications as a regular and predominent course of business. Among other relief not relevant to this appeal, it prayed that Chateau X be declared a nuisance under Chapter 19 of North Carolina General Statutes. The State also asked that an injunction issue ordering that defendants be "perpetually enjoined from maintaining, using, continuing, owning or leasing said place known as Chateau X Theater and Bookstore . . . as a nuisance" and "any place in the State of North Carolina as a nuisance."

On 20 December 1977 defendants made a motion to dismiss the action or, in the alternative, to continue it. They based this motion on the fact that there was a declaratory judgment action pending in the United States District Court for the Eastern District of North Carolina to test the constitutionality of Chapter 19. On 4 January 1978 defendants filed their answer along with a motion to dismiss the State's complaint on the ground that Chapter 19 is unconstitutional. After argument, the trial court denied defendants' motion.

The parties, by mutual stipulation, waived a jury trial. Trial was conducted before the judge beginning on 4 January 1978.



At trial, the State introduced twenty exhibits into evidence without objection by defendants. Nineteen of these were copies of magazines and films possessed for sale or shown by Chateau X. State's Exhibit Number 20 was an inventory of materials found at the operation on 12 December 1977.

The trial judge personally viewed State's Exhibit Number 15, a film called "Airline Cockpit," and State's Exhibit Number 3, a magazine entitled "Spread Your Legs." The parties mutually stipulated that all the films and magazines listed in the inventory, State's Exhibit Number 20, "contain substantially similar material" as is found in State's Exhibit Number 15 and State's Exhibit Number 3.

The defendants presented no evidence. The parties stipulated, however, "[t]hat if the defendants would testify, the evidence would indicate that the motion pictures exhibited and the books distributed and sold were done to consenting adults."

The trial judge found that State's Exhibits Numbers 15 and 3 are obscene, that the remainder of the nineteen films and magazines introduced into evidence are obscene, and that all the materials listed in the inventory are nuisances. He held that all the above films and magazines are nuisances. He also declared Chateau X itself to be a nuisance under Chapter 19.

The judge ordered that all the material listed on the inventory, State's Exhibit Number 20, be confiscated and destroyed. He enjoined the defendants from exhibiting or selling any of these items. The defendants also were enjoined from selling or showing any other obscene matter in the future which depicted certain specific sexual conduct listed in the order.

In his final order the trial judge interpreted a part of G.S. 19-5 as authorizing the actual closing of a business after it had been declared a nuisance. He held this portion unconstitutional.

Both the defendants and the State gave timely notice of appeal from the trial court's final judgment.

On 24 April 1978 the parties petitioned this Court pursuant to G.S. 7A-31(b) for review prior to it being determined by the Court of Appeals. We allowed the petition on 8 May 1978.

Attorney General RUFUS L. EDMISTEN by Senior Deputy Attorney General ANDREW A. VANORE, JR., Assistant Attorney General MARVIN SCHILLER and I. BEVERLY LAKE, JR. for the State.

BAILEY & RAYNOR BY EDWARD G. BAILEY and FRANK ERWIN; ARTHUR M. SCHWARTZ, P.C. by NEIL AYERVAIS for the defendants.

COPELAND, Justice.

This case concerns the statutory construction and constitutionality of Chapter 19 of North Carolina General Statutes. For the reasons set out below, we have determined that Chapter 19 as interpreted and applied in this case is constitutional; therefore, the judgment of the trial court is affirmed.

Both parties in this action have brought up assignments of error to this Court. The State is challenging certain interpretations and applications of Chapter 19 by the court below. As the resolution of these issues affects the defendants' constitutional questions, we will consider the State's assignments of error on cross-appeal first.



The core of the controversy in this case stems from that part of the trial court's order that enjoins the defendants from selling or showing obscene matter that is not listed on the inventory. This portion of the order states:

"2. The defendants . . . are hereby enjoined and restrained from:

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum,

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation.

e. Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum,

(2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or

(3) Persons engaging in masturbation."

The State contests two aspects of the above injunction. Both of them contain the argument that the judge did not go far enough.

The State first claims the trial court erred by enjoining films and publications showing only "enlarged" exhibits of the genitals during sexual intercourse. It argues that the court was required to prohibit the sale of matter depicting any genitals, enlarged or not, because of the mandates of G.S. 19-5, which reads in part: "If the existence of a nuisance is admitted or established . . . an order of abatement *shall* be entered as part of the judgment in the case." (Emphasis supplied.) Apparently the State is contending that once a business has been established as a nuisance, the judge is required to enjoin the future distribution of any and all obscene matter as defined by G.S. 19-1.1(2).[1] We do not agree.

The trial judge necessarily must be given some discretion in formulating his abatement order. The defendants will be subject to contempt of court if they violate the injunction; therefore, it is necessary that they be put on notice as to

[1] G.S. 19-1.1(2) states:

"Lewd matter" is synonymous with "obscene matter" and means any matter:
(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
(b) Which depicts patently offensive representations of:
1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.



exactly what material they can and cannot show or sell in the future. *See generally* D. DOBBS, REMEDIES § 2.4 (1973); Developments in the Law-Injunctions, 78 Harv. L.Rev. 994, 1064 (1965). A judge has a *duty* to supply this specificity. Rule 65(d) of the North Carolina Rules of Civil Procedure states that "[e]very order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, and not be reference to the complaint or other document, the act or acts enjoined."

The Legislature must have intended for judges to have some discretion in abating nuisances. "[L]egislative intent is usually ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." In re Hardy, 294 N.C. 90, 97, 240 S.E. 2d 367, 372 (1978). (Emphasis deleted.)

Chapter 19 as applied to obscene matter treads near the area of free speech. The sanctions for disobeying an abatement order could be severe. This Court need not decide today whether a judge must always issue a general injunction, such as this one, against selling or exhibiting obscene matter not actually before the court. *See D. Dobbs, supra* at § 2.11 note 22. We do hold, however, that if such an order does issue, the trial court has some discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and he has the duty to specifically warn the defendent of the prohibited conduct. This assignment of error is overruled.

The State next argues that the trial court's order was erroneous because it enjoined the defendants from selling obscene matter only when such material "constitutes a principal or substantial part of [their] stock in trade." It contends that the judge was required to restrain the defendants from

selling any lewd matter at all, whether or not it made up a large part of defendants' inventory.

A careful reading of the statute refutes this argument. As the State points out, G.S. 19-1.2[2] defines nuisances in terms of businesses that regularly display or sell lewd material and the obscene matter itself. However, G.S. 19-1.2(5) states that a lewd publication is a nuisance only when "possessed at a place which is a nuisance." In order for a bookstore to be a nuisance, the lewd publications must "constitute a principal or substantial part of the stock in trade."

Thus, not every isolated obscene publication is a nuisance that can be abated under G.S. 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. This assignment of error is overruled.

[2] G.S. 19-1.2. Types of nuisances. — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;
(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;
(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;
(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;
(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;
(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3).



The trial court determined that a part of G.S. 19-5, stating that the judge's final order "may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance," authorizes the complete closing of a theater or bookstore once it has been declared a nuisance under Chapter 19. It held that portion ineffectual in nuisance actions dealing with obscene matter because such a closing would be an unconstitutional prior restraint on free speech. The State concedes in its brief and in its argument before this Court that any complete closing of a business for past sales of obscene material would constitute illegal prior restraint. We agree. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 29 L.Ed. 2d 1, 91 S.Ct. 1575 (1971). Other states have so held. *See e.g.*, Sanders v. State, 231 Ga. 608, 203 S.E. 2d 153 (1974); State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P. 2d 760 (1976); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So. 2d 480 (La. 1973).

The State contends, however, that the trial court erred in interpreting G.S. 19-5 as authorizing such a complete closing. That issue is not properly before the Court at this time. This interpretation of the statute was not excepted to by the State, and it also was not included in its grouping of exceptions and assignments of error in the record on appeal.

Under Rule 10 of the Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." This mandate is subject to various exceptions, none of which are relevant here. The State is as much bound by these Rules as other parties before

the courts of this State. Thus, we do not now decide whether G.S. 19-5 does authorize a judge to completely close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material.

We turn now to defendants' assignments of error. At the outset, it is important to note what issues are not before this Court. The trial judge found all the items listed in the inventory, totaling over five hundred different films and magazines, to be legally obscene. Defendants do not contest this finding. Furthermore, from a cursory examination of some of that matter, suffice it to say that it is, in the words of Chief Justice Burger, "offensive to the point of being nauseous." Kaplan v. California, 413 U.S. 115, 117, 37 L.Ed. 2d 492, 496, 93 S.Ct. 2680, 2683 (1973). Thus, we are dealing here not with borderline obscenity but rather with patently hard-core pornography.

Secondly, the defendants do not object to that provision of the court's order restraining them from selling or exhibiting the material before the court. In essence, then, the defendants are attacking only the statute itself and that portion of the final order enjoining them from selling or showing obscene matter not before the court. We now turn to these contentions.

Defendants first assert the trial court erred in denying their motion to dismiss the State's complaint before trial. Although it is somewhat unclear, apparently they argue that Chapter 19 of North Carolina General Statues is unconstitutional on its face, thereby invalidating any action taken pursuant to it.

The defendants contend that the act in question is unconstitutional *per se* in two respects. First, they assert G.S. 19-5 authorizes the complete closing of a business in violation of the first amendment right of free speech. As stated



above, that issue is not being decided by the Court at this time. Assuming, however, that G.S. 19-5 does allow such an illegal action, defendant's position is still untenable.

When only part of a statute is unconstitutional, the constitutional portions will still be given effect as long as they are severable from the invalid provisions. State v. Smith, 265 N.C. 173, 143 S.E. 2d 293 (1965); Clark v. Meyland, 261 N.C. 140, 134 S.E. 2d 168 (1964). To determine whether the portions are in fact divisible, the courts first see if the portions remaining are capable of being enforced on their own. They also look to legislative intent, particularly to determine whether that body would have enacted the valid provisions if the invalid ones were omitted. *See* Hobbs v. Moore County, 267 N.C. 665, 149 S.E. 2d 1 (1966).

We find from an examination of the statute itself that Chapter 19 is sufficiently complete when this provision of G.S. 19-5, allegedly authorizing the padlocking of a business, is deleted. As that portion relates to only one of many possible remedies a court can adopt in its final order, the statute can be adequately enforced without it. Furthermore, in G.S. 19-8.3 the Legislature has provided guidance for dealing with its intent in this area:

> "If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid."

This argument is without merit.

The defendants also contend Chapter 19 is unconstitutional on its face because it places the burden of proving non-obscenity on a defendant in a nuisance action. They claim that G.S. 19-1.2(2), set out above in footnote 1, requires the defendant to prove as an affirmative defense that the material before the court as a whole lacks "serious literacy, artistic, political, educational, or scientific value."

In Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S.Ct. 2607 (1973), the United States Supreme Court laid down the present constitutional test for obscenity.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24, 37 L. Ed. 2d at 431, 93 S.Ct. at 2615. (Citation omitted.)

It is clear that the burden of proving obscenity must be on the State. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L. Ed. 2d 448, 95 S.Ct. 1239 (1975).

It is equally well settled, however, that legislative acts are presumed to be constitutional, and this Court will interpret a statute so as to comport with constitutional mandates unless such a construction is unreasonable. *See, e.g.,* Painter v. Board of Education, 288 N.C. 165, 217 S.E. 2d 650 (1975); Highway Commission v. Industrial Center, 263 N.C. 230, 139 S.E. 2d 253 (1964). Therefore, we find that the State is required to prove all the elements of obscenity found in G.S. 19-1.2(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political,



educational, or scientific value." The trial judge properly denied defendants' motion to dismiss the State's complaint.

The defendants next assert that the judge's final order dealing with illegal lewd matter not before the court enjoined absolutely protected matter. They claim that the order restrained the sale of non-obscene material because it failed to require that the magazines and films enjoined be "patently offensive" in their depiction of the specified sexual conduct.

The *Miller* test of obscenity contains three elements, one of which is that the material depicts defined sexual conduct "in a patently offensive way." A comparison of that test and G.S. 19-1.2 (2) shows that Chapter 19's definition of "lewd matter" almost exactly tracks the Supreme Court's language in Miller. In his final order, the trial court enjoined the defendants from showing or selling "illegal lewd matter" which "appeals to the prurient interest in sex," which is "without serious literary, artistic, educational, political or scientific value," and which shows certain sexual conduct. Thus, although the order restated almost all of the definition of obscenity in *Miller* and in G.S. 19-1.2(2), it did not specifically state that the sexual conduct being depicted be "patently offensive."

This minor omission is not fatal to the injunction. Other courts have held it permissible for an injunction to include terms that are adequately defined in applicable statutes. *See, e.g.,* Gulf King Shrimp Co. v. Wertz, 407 F. 2d 508 (5th Cir. 1969); Wilson Finance Co. v. State, 342 S.W. 2d 117 (Tex. Civ. App. 1960). In the case before us the trial judge enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in G.S. 19-1.2(2). Thus, the constitutional requirements of *Miller* have been met, and defendants have been restrained from dealing in only legally

obscene magazines and films and not ones protected by the first amendment. This assignment of error is overruled.

Defendants' main argument is that the judge's order restraining them from selling or exhibiting obscene matter not actually before the court is unconstitutional. They claim such action constitutes an illegal prior restraint in violation of their first amendment right of free speech.

The United States Supreme Court has repeatedly stated that the first and fourteenth amendments are not absolute. Even the greatly revered right to freedom of speech is subject to various exceptions, one of which is obscenity. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." Miller v. California, *supra* at 23, 37 L. Ed. 2d at 430, 93 S.Ct. at 2614. It is equally well settled that the states have a long-recognized legitimate interest in regulating obscenity in the commercial context, which has become big business. *See generally* Cook, The X-Rated Economy, FORBES, Vol. 122, No. 6, Sept. 18, 1978.

> "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63, 37 L.Ed.2d 446, 460, 93 S.Ct. 2628, 2638 (1973).

A State can constitutionally attempt to control commercial obscenity through its criminal laws. Roth v. United States, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957). However, that is not the only avenue open to it.



> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts [a state] to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice." Kingsley Books v. Brown, 354 U.S. 436, 441, 1 L.Ed. 2d 1469, 1473-74, 77 S.Ct. 1325, 1327-28 (1957). *See also* Times Film Corp. v. Chicago, 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391 (1961).

Of course, the legislature must choose those means that are within constitutional boundaries.

Defendants have concluded that because it is an injunction they are attacking, that remedy automatically constitutes a prior restraint. We note, however, that in this area prior restraint normally means when allegedly obscene material is seized or preliminarily enjoined before a judicial declaration of obscenity, *see, e.g.,* Marcus v. Search Warrant, 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708 (1961); Kingsley Books v. Brown, *supra.,* or when a person is required to submit material for the approval of a licensing body before it is allowed to be distributed or shown to the public. *See, e.g.,* Times Film Corp. v. Chicago, *supra;* Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 3 L.Ed. 2d 1512, 79 S.Ct. 1362 (1959). In fact, we could find no decision by the United States Supreme Court that struck down an injunction such as this one or that even labelled one a prior restraint.

Assuming, however, that this injunction does fit the definition of a prior restraint, our inquiry as to its legality

does not end there. For prior restraints are not *per se* unconstitutional. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed. 2d 448, 95 S.Ct. 1239 (1975). Rather, the courts must test its validity by its operation in practice, and they have looked to see how the statute differs in effect from a criminal law against selling obscene matter. Kingsley Books v. Brown, *supra*.

In *Kingsley Books* the Supreme Court compared a New York statute, authorizing a preliminary injunction against the distribution of allegedly obscene matter for a short time pending trial, with a criminal obscenity law. In upholding that statute, that Court stated:

> "Criminal enforcement and the proceeding under [the New York statute] interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. . . . In each case the bookseller is put on notice by the complaint that sale of the publication charged with obscenity may in the period before trial subject him to penal consequences. In one case he may suffer fine and imprisonment for violation of the criminal statute in the other, for disobedience of the temporary injunction. The bookseller may of course stand his gornd and confidently believe that in any judicial proceeding the book could not be condemned as obscene but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content—the threat of penalization." *Id.* at 442-43, 1 L.Ed. 2d at 1475, 77 S.Ct. at 1328-29.

Although we realize that the preliminary injunction in *Kingsley* is quite different from the injunction being scrutinized in this case, the Court's analysis provides us with



some guidance. The judge's order here is restricted to legally obscene matter; in fact it is limited to only a specified portion of what is legally obscene. Thus the defendants suffer less indecision as to what materials they can deal in under the injunction than they would under a usual criminal obscenity statute. It is true that the defendants may be fined or imprisoned if they violate the injunction, but those same consequences could flow from a violation of the criminal law.

In fact, under a Chapter 19 nuisance proceeding, unlike a prosecution under a criminal law, a defendant gets two chances. Before such an injunction issues, a court must find that a defendant sold illegal lewd matter in the past; however, he is not subject to criminal sanctions until he sells obscene matter again in violation of the court's order. *See* Rendleman, *Civilizing Pornography, The Case For An Exclusive Obscenity Nuisance Statute,* 44 Chi. L. Rev. 509, 556 (1977).

There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always defend on the ground that the material is not legally obscene. *See* McKinney v. Alabama, 424 U.S. 669, 47 L. Ed. 2d 387, 96 S.Ct. 1189 (1976). The burden is on the State to prove obscenity beyond a reasonable doubt. *See* G.S. 5A-15(f) (Cum. Supp. 1977). Although a defendant is not entitled to a jury trial in the contempt action, the United States Supreme Court has held that a defendant has no constitutional right to a jury trial in criminal contempt actions if the authorized penalty or the penalty actually imposed does not exceed six months imprisonment. Taylor v. Hayes, 418 U.S. 488, 41 L. Ed. 2d 897, 94 S.Ct. 2697 (1974). Under G.S. 19-4, a defendant is subject only to "a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and

imprisonment." Thus, an injunction such as this one is in effect nothing more than a personalized criminal statute against selling certain obscene material that is directed toward the defendants because they sold illegal matter in the past. As the Legislature could have constitutionally imposed the same restrictions on the public in general, it is not an unconstitutional prior restraint.

Although this point has not been raised by any party to this lawsuit, we note that G.S. 19-4 authorizes a judge to "summarily try and punish the offender" for violation of an injunction issued under Chapter 19. While this "summary" action is not defined by the Legislature, we emphasize that the procedural safeguards outlined above must be followed. *See* Harris v. United States, 382 U.S. 162, 15 L. Ed. 2d 240, 86 S.Ct. 352 (1965); Cooke v. United States, 267 U.S. 517, 69 L.Ed. 767, 45 S. Ct. 390 (1925).

Although there are provisions for summary criminal contempt proceedings in G.S. 5A-13 and G.S. 5A-14, they apply only to acts of contempt committed near or before a judicial officer which are "likely to interrupt or interfere with matters then before the court." A violation of an order such as this one certainly does not fall within that category. Therefore, the plenary proceedings provided for in G.S. 5A-15 apply to contempt actions following a Chapter 19 injunction.

Defendants strongly assert that this case is controlled by Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931). That case concerned a state statute that authorized abatement of certain nuisances, one of which was "a malicious, scandalous and defamatory newspaper." The trial court found the newspaper in question to be a public nuisance, and it permanently enjoined defendants "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title." The United States Supreme Court struck down the injunction, declaring



that it constituted an invalid prior restraint on defendants' first amendment right to freedom of the press. While there are some analogies between *Near* and this case, we feel that the two are distinguishable in several important respects.

The defendants in *Near* operated a newspaper that chiefly made allegations of misconduct directed toward public officers. The Court, in dealing with the issue of freedom of the press repeatedly emphasized that "[t]hat liberty was especially cherished from the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct." *Id.* at 717, 75 L. Ed. at 1368, 51 S.Ct. at 631.

The difference between trying to limit that type of expression and obscenity has been recognized. "[I]t is manifest that society's interest in protecting this type of expression [erotic material] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Young v. American Mini Theatres, 427 U.S. 50, 70, 49 L. Ed. 2d 310, 326, 96 S.Ct. 2440, 2452 (1976). We agree with Justice Stevens when he said: "It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment." Smith v. United States, 431 U.S. 291, 318-19, 52 L.Ed. 2d 324, 346-47, 97 S.Ct. 1756, 1773 (1977) (Stevens, J., dissenting on other grounds). *See also* Kingsley Books v. Brown, *supra* at 445, 1 L.Ed. 2d at 1476, 77 S.Ct. at 1330.

It is clear from the *Near* decision itself that the Court did not intend for it to apply to injunctions concerning obscene materials.

The Minnesota statute in *Near* also authorized an injunction against obscene publications declared to be nuisances. However, the Court specifically limited its holding to

striking down clause (b) of the act that dealt with malicious and defamatory newspapers. "The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance." *Id.* at 737, 75 L.Ed. at 1378, 51 S.Ct. at 638 (Butler, J., dissenting).

The Court in *Near* was also concerned about the lack of specificity in the trial court's injunction, which restrained the defendants from publishing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The Court noted that "scandalous and defamatory" are broadly defined by law to include publications charging official misconduct. Therefore, if one of the defendants' future editions contained any such allegations, the defendants would then have to prove that the publication is "usual and legitimate," "consistent with the public welfare," and published with "good motives and for justifiable ends" in order not to be held in violation of the order. The Supreme Court recognized that these are vague standards at best.

Our case is different. We have already stated that the burden would be entirely on the State to prove that these defendants had shown or sold illegal lewd matter in violation of the injunction. More importantly, this order is narrowly drawn, and the prohibited conduct is specifically defined.

The defendants assert that the danger here is in selfcensorship; they will limit their sale of constitutionally protected matter for fear that they may violate the injunction. The Supreme Court has addressed this issue.

> "The fact that the First Amendment protects some, though not necessarily all, [erotic] material from total suppression does not warrant the further conclusion that



> an exhibitor's doubts as to whether a borderline film may be shown in his theater . . . involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like Dombrowski v. Pfister, 380 U.S. 479 [holding that a person can collaterally attack the constitutionality of a criminal law that chills free speech in the political context]." Young v. American Mini Theatres, *supra* at 61, 49 L.Ed. 2d at 321, 96 S. Ct. at 2448.

We are sensitive to the importance of defendants' claim that their first amendment right to free speech is being chilled by the injunction against future sales of unnamed matter. However, in light of the unquestionable obscene nature of all defendants' films and magazines before the court below, the fact that the defendants are adequately warned of which materials they cannot sell or exhibit by the specifically drawn order, and the procedural safeguards afforded the defendants, we find that the injunction is not an unconstitutional prior restraint.

As to all issues that are properly before this Court, the trial court is in all respects

AFFIRMED.

Justices Britt and Burke did not participate in this decision.

No. 23 — State ex rel v. Chateau X

Fall Term 1978

EXUM, Justice, dissenting:

As the majority opinion notes at the outset, the present case "concerns the statutory construction and constitution-

ality of Chapter 19 of [the] North Carolina General Statutes." I disagree in part with the majority's handling of both aspects. As to the first, the majority upholds an injunction the breadth of which is not authorized by the statute. As to the second, the procedure upheld here is an unconstitutional prior restraint on the exercise of freedom of speech and the press.

I agree that the "core of the controversy in this case stems from that part of the trial court's order that enjoins defendants from selling or showing obscene matter that is not listed on the inventory," i.e., matter described in the abstract by the statutory definition of obscenity that defendant might acquire in the future. The majority assumes, without stating its reasons therefor, that the trial court was authorized by the statute to enter an order this broad. As I read the statute, it authorizes only an injunction against future possession or sale of matter before the court and judicially declared to be obscene at the proceeding in which a defendant is adjudged to be maintaining a nuisance.

Chapter 19, which is entitled "Abatement of Nuisances," is not an easy statute to comprehend. Besides obscenity, it deals with places used for purposes of "assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors [and] illegal possession or sale of narcotic drugs . . ." G.S. 19-1(a). It is, in other words, a general nuisance abatement statute. One of the key methods of abatement it seems to contemplate is the closing of the place where the nuisance is maintained. See G.S. 19-2.1, 19-5, 19-6, 19-7. Insofar as these closing provisions might be applied to a place that disseminates printed material or motion pictures, there are, it is conceded, serious constitutional questions. *See* State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P. 2d 760 (1976); General Corporation v. Sweeton, 294 Ala. 657, 320 So. 2d 668 (1975).



There are however, other remedies provided under the statute against one maintaining a nuisance. It is one of these other remedies that is involved here. In addition to the abatement of the nuisance by closing, G.S. 19-2.1 provides for a suit "perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter . . ." The statute's primary remedial provisions are set out in G.S. 19-5, as follows:

"*Content of final judgment and order.* — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, *which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State.* Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

"Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

"The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and

moneys received therefrom, after the issuance of a preliminary injunction, forfeited." (Emphasis supplied.)

Under this provision the question whether the injunction here is authorized boils down to what is meant by enjoining the defendant or any other person from "further maintaining the nuisance" and from "maintaining such nuisance elsewhere." This language implies a limitation on the scope of injunctive relief to materials before the court at the time of the determination that a nuisance exists. The acts that can be enjoined are "further maintaining *the* nuisance" or "maintaining *such* nuisance elsewhere." The General Assembly has chosen at those two points in this provision to use quite specific language. This language must refer to the particular materials found by the trial court to be "lewd matter" and on which it must have based its determination that a nuisance existed. Thus, a defendant can under the statute be enjoined from restocking the same materials that have once been judicially determined obscene. The statute does not, however, give the court power to enjoin a defendant from selling or showing other materials that are not before it.

In addition to avoiding a serious constitutional question, *see* In re Arthur, 291 N.C. 640, 231 S.E. 2d 614 (1977); In re Dairy Farms, 289 N.C. 456, 223 S.E. 2d 323 (1976), interpreting the statute in this fashion would make it compatible with our criminal obscenity statutes. *See* G.S. 14-190.1 through 14-190.8. Under those statutes, there is provided "an adversary determination of the question of whether books, magazines, motion pictures or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials." G.S. 14-190.2(a). Thus under our criminal statutes, no one can be prosecuted for selling, showing, distributing or disseminating any material until it has first been determined to be obscene. Where the General Assembly has not spoken more clearly, it



is reasonable to assume that it intended this related nuisance statute, which carries with it a possibility of contempt punishment, *see* G.S. 19-4, to follow a similar procedure.

I think the injunction is broader than permitted by the statute and should not be upheld in its entirety. Furthermore the majority's contrary interpretation renders the statute unconstitutional insofar as it permits an injunction against future expression.

The trial judge enjoined defendants from "possessing for exhibition to the public" and "possessing for sale and selling" various kinds of "lewd matter." This "lewd matter" was described generically in the injunction itself in terms of the statutory prohibition. *See* G.S. 19-1.1(2). The injunction thus seeks to proscribe categories of expression rather than any particular film or publication which has been specifically and judicially declared violative of the statute. It prohibits the future possession of unnamed films, magazines, books and papers and subjects defendants to possible fines and imprisonment prescribed in G.S. 19-4 if they should violate it by possessing any of these generically described items which might later be judicially determined in a contempt proceeding to fit within its proscription.

Insofar as the statute authorizes this kind of injunction I believe it and, therefore, the injunction itself contravenes the freedom of speech and freedom of the press clauses of the First Amendment as applied to the states under the Fourteenth Amendment. To me this is the kind of prior restraint against future expression which the United States Supreme Court has consistently and rightly determined to be inconsistent with the guarantees of the First Amendment. The highest courts of at least three other states have found orders virtually identical to the one here to be unconstitutional prior restraints. Parish of Jefferson v. Bayou Landing Ltd., Inc., 350 So. 2d 158, 165-68 (La. 1977); Mitchem v. Schaub,

250 So. 2d 883 (Fla. 1971); New Rivieria Arts Theatre v. State, 219 Tenn. 652, 412 S.W. 2d 890 (1967). In addition, in a carefully considered opinion, Judge Franklin T. Dupree, Jr., an able jurist noted for his industry and scholarship, has held that insofar as G.S. 19-5 allows an injunction against distribution of materials not previously adjudged obscene, it is unconstitutional. Fehlhaber v. State, 445 F. Supp. 130 (E.D.N.C. 1978). Examination of the relevant constitutional doctrines as applied by the Supreme Court leaves no doubt that these results were correct.

In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Georgia state prosecutors had filed civil complaints against an Atlanta theater alleging that it was exhibiting two obscene films contrary to a Georgia statute. The complaint prayed that the two films be declared obscene and that the theater be enjoined from exhibiting them. At a non-jury trial, the judge assumed that the films were obscene but ruled that inasmuch as the theater took reasonable precautions against permitting minors to enter and view the films it was constitutionally impermissible to enjoin their further showing. The Georgia Supreme Court reversed. It described the films as "hard core pornography" leaving "little to the imagination" and held that their further exhibition should have been enjoined. Slaton v. Paris Adult Theatre I, 228 Ga. 343, 347, 185 S.E. 2d 768, 770 (1971). The United States Supreme Court in a 5-4 decision essentially approved the Georgia civil injunction procedure. It remanded the case, however, for reconsideration by the Georgia Supreme Court in light of the new definitions of obscenity contained in Miller v. California, 413 U.S. 15 (1973), decided the same day. In approving the use of injunctive action, however, Chief Justice Burger, writing for the majority, was careful to note, 413 U.S. at 55:

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of Blount v. Rizzi, 400 U.S. 410, 417, 27 L.Ed. 2d 498, 91 S.Ct. 423 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-142, 19 L.Ed. 2d 966, 88 S.Ct. 754 (1968); Freedman v. Maryland, 380 U.S. 51, 58-59, 13 L.Ed. 2d 649, 85 S.Ct. 734 (1965); and Kingsley Books, Inc. v. Brown, *supra,* at 443-445, 1 L.Ed. 2d 1469, were met. Cf. United States v. Thirty-seven Photographs, 402 U.S. 363, 367-369, 28 L.Ed. 2d 822, 91 S.Ct. 1400 (1971) (opinion of White, J.)."



In Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), the Court approved a New York procedure "authorizing the chief executive, or legal officer, of a municipality to invoke a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications." *Id.* at 437. Justice Frankfurter, writing for the majority of five, again, was careful to point out that the procedure under consideration "studiously withholds restraint upon matters not already published and not yet found to be offensive." *Id.* at 445. On this basis he distinguished the procedures then before the Court from those which had been earlier condemned in Near v. Minnesota, 283 U.S. 697 (1931).

In *Near v. Minnesota,* the leading case on the constitutionality of injunctions against future expression, the Court had before it a Minnesota statute which provided in pertinent part as follows:

> "Section 1: Any person who . . . shall be engaged in the business of regularly . . . producing, publishing or circulating, having in possession, selling or giving away,
>
> (a) an obscene, lewd and lascivious newspaper,

magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided." *Id.* at 702.

The statute further authorized the county attorney or any citizen to maintain an action for the injunction authorized by the statute. A proceeding for an injunction was brought in the Minnesota state courts against Near and other defendants. At trial it was found as a fact that the defendants had published various editions of a periodical known as "The Saturday Press" from 24 September 1927 to 19 November 1927 and that these editions were "'chiefly devoted to malicious, scandalous and defamatory articles.'" It was further found that the defendants "'did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper'" and that such publications constituted a public nuisance. The trial court thereupon enjoined the publication of "The Saturday Press" and perpetually enjoined defendants from publishing "'any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.'" *Id.* at 706. The Supreme Court, with Chief Justice Hughes writing for a majority of five, concluded that the injunction was "the essence of censorship" and constituted the kind of prior restraint on expression that was violative of the freedoms of press and speech guaranteed by the First Amendment and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court said in meeting the arguments of the State of Minnesota:

"Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes.



* * *

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication." *Id.* at 720, 721-22.

Thus, the Court in *Near* made it clear that the truth or falsity of the charges contained in the particular periodicals under consideration was immaterial to the constitutional question of whether future publications could be enjoined.

Relying on *Near*, the Court in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), struck down an Illinois state court injunction against "'passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the city of Westchester, Illinois.'" The trial court found that the persons enjoined had, through the distributions of certain pamphlets, accused a real estate broker in Westchester, Illinois, of arousing fears of local white residents that negroes were moving into the area and thereafter exploiting their reactions to bolster his real estate business. The trial court found that the pamphleteers' activities in Westchester had invaded the real estate agent's right of privacy and had caused irreparable harm and that he was without an adequate remedy at law. The Supreme Court in an opinion by Chief Justice Burger struck down the injunction saying:

"It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under Near v. Minnesota, 283 US 697, 75 L Ed 1357, 51 S Ct 625 (1931), the

injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on first Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Id.* at 418-19.

In New York Times Co. v. United States, 403 U.S. 713, (1971), the United States government sought to enjoin the *New York Times* and the *Washington Post* from publishing contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" (the Pentagon papers). District courts for the Southern District of New York and the District of Columbia and the Court of Appeals for the District of Columbia Circuit had refused to issue an injunction against the newspapers. The Court of Appeals for the Second Circuit held, however, that the injunction should issue. The United States Supreme Court in a per curiam opinion concurred in by six justices concluded that the injunction should not issue notwithstanding that in the opinions of the various concurring justices the Pentagon papers, if published, would have "serious impact" on the national security, would "do substantial damage to public interest" and might even constitute a violation of federal criminal law. This case is significant in the area of the permissible limits of restraint on expression in that the very materials sought to be restrained were before the Supreme Court for review. Here, by contrast, the restraint is against materials yet to be seen or even published.

Any restraint against future expression, the Supreme Court has repeatedly said, comes "'bearing a heavy presumption against its constitutional validity.'" Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975), and cases there cited. The reason is that there often is a finely drawn line between protected speech under the First



Amendment and that which is not so protected. This is particularly true in the area of obscenity. There are, of course, many items which are clearly on one side or the other of that line. Defendants here concede that all items now before the court are obscene. Under the statute they can be seized and destroyed. There is no contest in this case as to them. On the other hand there are many forms of expression upon which reasonable persons differ regarding whether they are obscene, or lewd, within the statutory definition of those terms. Examples abound in our literature, cinematic and otherwise.[1] One is found in Yeager v. Neal, 26 N.C. App. 741, 217 S.E. 2d 576 (1975). That case concerned the film, "Memories Within Miss Aggie" which the state sought to have declared obscene as that term was defined in a criminal statute, G.S. 14-190.1.[2] At the adversary hearing required by G.S. 14-190.2, over which I, as trial judge presided, the

---

[1]Masturbation, homosexuality and sadism are depicted in a recently released film, "Midnight Express," which has nevertheless been critically acclaimed and could hardly be said to lack serious literary, artistic and educational value. *See Newsweek,* 16 October 1978, at 76, 81; *Time,* 16 October 1978, at 111-12; *Vogue,* September 1978, at 62.

Sodomy per anum was graphically depicted in the critically acclaimed film, "Last Tango in Paris." *See Newsweek,* 12 February 1973, at 54-58.

The works of Henry Miller, *Tropic of Capricorn* and *Tropic of Cancer,* were once widely considered obscene, but are now highly regarded as literary pieces. *See* Gordon, *The Mind and Art of Henry Miller* (1967). The same can be said of D. H. Lawrence's *Lady Chatterly's Lover. See* Sanders, *D. H. Lawrence: The World of the Five Major Novels,* at 172-205 (1973). *See generally* Rembar, *The End of Obscenity* (1968).

[2]The applicable parts of the statute are as follows:

"(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual

film was shown and various witnesses testified about it. All of the witnesses by reason of training and background possessed some expertise in the field of literary criticism. All felt that the film was clearly a serious literary and artistic work. There was *no* testimony to the contrary. Finding on the evidence presented including the film itself that the film did have serious literary and artistic value, I determined that it could not be declared obscene. The Court of Appeals affirmed on the basis of this finding which was not excepted to by the state although according to a vigorous dissent by Brock, C.J., a member of the panel who also viewed it, they all agreed that "the film depicts in a patently offensive way portrayals of actual sexual intercourse, normal and perverted, anal and oral, and a lewd exhibition of uncovered genitals in the context of masturbation." *Id.* at 745.

The difficulty of defining obscenity in the abstract has long been anathema to legislatures and courts. Some judges have conceded that efforts to do so must ultimately fail.[3]

matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity."

[3]Miller v. California, *supra*, 413 U.S. 15, 37 (Douglas, J., dissenting); Paris Adult Theatre I v. Slaton, *supra*, 413 U.S. 49, 73 (Brennan, J., dissenting); *see also* Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting in a federal criminal obscenity prosecution, sustained by the majority on the ground that "the line between communications which 'offend' and those which do not is too blurred to identify



Other judges, however, assert that they know obscenity when they see it.[4] If this is so, then a corollary must be that judges cannot know it *until* they see it. Even if obscenity can be defined in the abstract, it cannot be so enjoined in keeping with the First Amendment. To be dealt with judicially it must first be judicially seen.

Thus the Supreme Court has consistently insisted that

criminal conduct." *Id.* at 316.) The majority opinion, I fear, does not fully represent Justice Stevens' position in this area. He said, *id.* at 318-21:

"It seems to me ridiculous to assume that no regulation of the *display of sexually oriented material* is permissable unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what *one citizen may communicate to another by appropriate means.*

"I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." (Emphasis supplied.)

[4]"I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hardcore pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring.)

states in their efforts to regulate prohibited forms of expression adopt procedures which are sensitive to the constitutional mandate that protected expression be in no wise threatened:

> "'[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for sensitive tools. . . .'Speiser v. Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." Marcus v. Property Search Warrant, 367 U.S. 717, 731 (1961); *accord,* Southeastern Promotions, Ltd. v. Conrad, *supra,* 420 U.S. 546.

The majority relies on the proposition that an injunction against future expression which, by definition, will be violative of the law is no greater threat to protected speech than a statute which imposes criminal sanctions against one who engages in such expression. Since the United States Supreme Court has approved such criminal sanctions against obscenity, the majority contends, it ought to approve these kinds of junctions. This argument is an old one. It was made and had to be faced in *Near v. Minnesota*. There the Supreme Court, recognizing that libel could be punished criminally, nevertheless struck down a civil injunction against it. The Court there said, 283 U.S. at 713-14:

> "The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.



> Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl. Com. 151, 152; *see* Storey on the Constitution,, §§ 1884, 1889."

The Supreme Court rejected the argument then and has consistently rejected it since. The Court said in Southeastern Promotions, Ltd. v. Conrad, *supra*, 420 U.S. 546, 558-59:

> "The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

The reason for this distinction is thus that in a free society restraints on expression not yet uttered are totally antithetical to any notion of free speech largely because of the then uncertainty of what might be said. Once the expression is made it is an accomplished fact upon which it is permissible for courts to act as in other criminal cases. If the expression be illegal those responsible can be held accountable. This notion unheres elsewhere in the law in the familiar doctrine of admittedly uneven application that equity will not enjoin a proposed criminal act on the ground that there is a complete remedy at law if the act is committed. *See* Mills v. Cemetery Park Corp., 242 N.C. 20, 86 S.E. 2d 893 (1955); Dare County v. Mater, 235 N.C. 179, 69 S.E. 2d 244 (1952).

Another distinction is that in a criminal action various procedural safeguard are present, for example, entitlement to a jury trail. Alleged violations of the kind of injunction issued in this case may be tried and punished by the presiding judge.[5]

Furthermore it is well to note again that in North Carolina one may not be criminally prosecuted for dealing in obscene materials unless he deals in material which has first been judicially declared to be obscene in an adversary hearing conducted prior to the criminal prosecution. G.S. 14-190.2. There seems to be no constitutional requirement for such an adversary proceeding prior to criminal prosecution, Miller v. California, *supra*, 413 U.S. 15, but our General Assembly has deemed it appropriate to provide such protection.

The construction which I feel should be given this legislation does not render the state powerless to deal with the problem of obscenity. The legislature could, if it thinks such action necessary, amend its criminal statutes, G.S. 14-190.1, et seq., so as to eliminate the requirement of an adversary hearing prior to criminal prosecution or provide penalties for the violation thereof which would serve to deter violators. Even under the civil nuisance proceeding as I would interpret it, the remedies against dissemination of obscene material are formidable. Once such materials are located an ex parte judicial order may issue forthwith placing substantial

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[5]G.S. 19-4 provides:

"*Violation of injunction; punishment.* — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment."



limitations on trafficking in the material. G.S. 19-2.3. If, thereafter, the material is judicially determined or admitted to be obscene it can be confiscated and destroyed. G.S. 19-5. All monies paid in consideration for the sale of abscene material after the ex parte order has issued must be accounted for, and if these monies are thereafter determined to have been paid in consideration of obscene material they may be forfeited to the local government. G.S. 19-6. Even if a defendant, determined to violate these statutes, replenishes his stock with items different from those previously confiscated under prior orders, it would seem that only a few successive confiscations of his stock in a campaign of zealous law enforcement would render his unsavory business so unprofitable that he would have to quit.

For the reasons stated I vote to vacate so much of the trial court's order as seeks to enjoin defendants from dealing in items not yet published or possessed by them.

I HEREBY CERTIFY that on this 23rd day of February, 1979, I have served a copy of this Brief upon Counsel for Appellant by mailing copy thereof, postage prepaid, addressed to:

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IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-1391

CHATEAU X, INC., et al.,

*Petitioners,*

v.

STATE OF NORTH CAROLINA,
*ex rel.* WILLIAM H. ANDREWS,
District Attorney for the Fourth District of
North Carolina,

*Respondent.*

## BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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## OPINION BELOW

The opinion of the North Carolina Supreme Court is reported at *State of North Carolina, ex rel. Andrews* v. *Chateau X, Inc.*, 296 N.C. 251, 250 S.E. 2d 603 (1979), a copy of which was appended to Petitioner's petition.

## JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257 (3).

## QUESTION PRESENTED

Whether an injunction against the future sale of "obscene materials," as that term is defined by state law, represents an unconstitutional prior restraint on rights guaranteed to the Petitioners by the First and Fourteenth Amendments to the United States Constitution?

## CONSTITUTIONAL PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION

### Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble and to petition the government for a redress of grievances.

### AMENDMENT XIV

§1. Citizenship defined - privileges of citizens - All persons born or naturalized in the United States, and



subject to the jurisdiction therefore, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## NORTH CAROLINA STATUTORY PROVISION INVOLVED

### North Carolina General Statutes §19-5

**Content of final judgment and order.** — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing

of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited.

## I.

## STATEMENT OF THE CASE

Respondent sets forth the salient facts of this case because of certain omissions, inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

The Respondent, William H. Andrews, District Attorney for the Fourth Judicial District of North Carolina, instituted a civil nuisance abatement action, pursuant to Chapter 19 of the General Statutes,[1] against the Petitioners to enjoin them from conducting a pornographic nuisance. The case was tried in Onslow County on January 4, 1978, before the Honorable Herbert J. Small, Judge Presiding. The parties, by

[1] Chapter 19 of the North Carolina General Statutes is reproduced in its entirety in Appendix "A," *infra* at pp. A-1 thru A-18.



mutual stipulation, waived their right to trial by jury. The trial court heard evidence presented by the Respondent only, as the Petitioners chose not to present evidence. The trial court,[2] after reviewing the evidence and making detailed findings of fact, enjoined the Petitioners from, among other things, selling obscene matter which constitutes a principal or substantial part of their stock in trade and which depicts or shows persons engaged in sodomy, per os or per anus, enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, and persons engaged in masturbation. It is this portion of the trial court's injunction, which was issued pursuant to N.C.G.S. §19-5, from which the Petitioners seek relief.

The trial court found that each of the films, books, magazines and papers seized from the Petitioners' store were, when taken as a whole by the average person applying contemporary community standards, appeal to the purient interest in sex, portrays sexual conduct in a patently offensive way, and totally lacks serious literary, artistic, educational, political or scientific value. The trial court, accordingly, found each item obscene.[3] The parties had previously stipulated that the remaining items in Petitioners' inventory were substantially similar to the items individually reviewed

[2] The trial court's judgment is reproduced in its entirety in Appendix "B," *infra* at pp. A-19 thru A-44.

[3] The statutory definition of obscenity delineated in N.C.G.S. §191.1 is taken virtually verbatim from *Miller* v. *California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419 (1972).

by the trial court. The trial court further found that the petitioners' establishment was a pornographic nuisance as defined by N.C.G.S. §19-1.2. This nuisance abatement law focuses upon a building or place in which obscene films are exhibited in the regular and predominant course of business and obscene publications constitute a principal part of the stock in trade.

The trial court did, however, hold that one provision of §19-5 is unconstitutional. The provision stated: "Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." The trial court's holding was based upon its reading of the provision as requiring the complete closing for all purposes of a business adjudged a pornographic nuisance.

In a previous federal case, *Fehlhaber* v. *North Carolina,* 445 F. Supp. 130 (E.D. N.C. 1978), *appeal docketed,* Nos. 78-1112 and 78-1818, 4th Cir., Feb. 24, 1978, a federal district court judge held that the provision quoted above did not authorize padlocking. 445 F. Supp. at 137. The district court judge did, nonetheless, hold that the remaining provisions of §19-5 constituted an unlawful prior restraint upon freedom of expression. 445 F. Supp. at 140. However, contrary to Petitioners' assertion on page five of their Petition, the district court judge did not hold the North Carolina nuisance statute unconstitutional in several respects. Indeed, the district court held Chapter 19 constitutional



in all other respects which the court considered for adjudication.

The Supreme Court of North Carolina, which affirmed the judgment of the trial court, held that the issue of whether §19-5 authorizes the complete closing of a theatre or bookstore after being declared a nuisance under §19-1.2 was not before it.[4] 296 N.C. at 258, 250 S.E. 2d at 608. The court did agree with the State's concession that any complete closing of a business for past sales of obscene material would constitute an illegal prior restraint. The court added, however, that the provision of §19-5 allegedly authorizing the padlocking of a business is severable from and independant of the remaining enforcement provisions of §19-5. 296 N.C. at 259-260, 250 S.E. 2d at 608-609, *citing* N.C.G.S. §19-8.3. Thus, Petitioners' contention on page seven of their Petition, that the North Carolina Supreme Court did not rule on their contention that §19-5 was an unconstitutional prior restraint, is patently erroneous. In any case, the severable provision of §19-5 is not before this Court.

The Supreme Court of North Carolina held that Chapter 19 and the trial court's injunction issued pursuant thereto are constitutional. 296 N.C. at 254,

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[4]The North Carolina Supreme Court refused to permit the Respondent to raise this issue on appeal since the issue had not been properly preserved under the North Carolina Rules of Appellate Procedure. The Petitioners, apparently, had also failed to preserve the issue as a basis of appeal.

250 S.E. 2d at 605. The court initially observed that §19-5 does not require the trial court to enjoin the future distribution of any and all obscene matter, as defined in §19-1.1(2), after a business has been adjudged a pornographic nuisance. 296 N.C. at 255-256, 250 S.E. 2d at 607. Further, not every isolated publication is a nuisance which can be abated under §19-1.2. An obscene book or magazine must first be found as one of many such items possessed as a principal part of the stock in trade. 296 N.C. at 257, 250 S.Ed. 2d at 607. Likewise, in order for lewd films to constitute a nuisance, they must have been publicly exhibited in the predominant and regular course of business. N.C.G.S. §19-1.2 (1).

In rejecting the Petitioners' contention that the trial judge's injunction issued pursuant to §19-5 was an unconstitutional prior restraint, the North Carolina Supreme Court tested the validity of the injunction by its operation in practice and by then comparing the effect of §19-5 with the effect of a comparable criminal statute. 296 N.C. at 263-265, 250 S.E. 2d at 610-611, *citing Kingsley Books* v. *Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S. Ct. 1325 (1957). The court noted that a defendant in a Chapter 19 nuisance proceeding, unlike the typical criminal defendant,is provided with two chances before the sanctions of imprisonment or fine may issue pursuant to §19-4. The court found that there is no procedurally significant difference between a contempt action under Chapter 19 for violation of a §19-5 injunction and the standard criminal action for selling obscene materials. Thus, the court concluded



that a §19-5 injunction is, in effect, nothing more than a personalized criminal statute. *Id.* Inasmuch as the trial court's injunction restricted the Petitioners from possessing as a principal part of their stock in trade only a specified portion of what is legally obscene, the North Carolina Supreme Court observed that "the defendants suffer less indecision as to what materials they can deal in under the injunction than they would under a usual criminal statute."[5] 296 N.C. at 264, 250 S.E. 2d at 611.

## II.

## REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

### A. The Present Conflict in the Law Must be Settled.

It is the position and suggestion of Respondent that the Petition for Writ of Certiorari should be granted so that the important constitutional right of a state to abate pornographic nuisances may be affirmed and so that the present conflict between the law as established by the North Carolina Supreme Court in *Chateau X* and

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[5]In North Carolina, unlike other states, one may not be criminally prosecuted for dealing in obscene materials unless he deals in materials which have first been judicially declared to be obscene in an adversary hearing conducted prior to the criminal prosecution. *See* N.C.G.S. §14-190.2.

the law as established by the United States District Court for the Eastern District of North Carolina in *Fehlhaber* be settled. It is for this reason that Respondent did not, at first, file a reply to Petitioners' Petition for Certiorari.

While it might appear that Respondent's immediate self-interest would be served by denying the Petition for Certiorari, it is the belief of Respondent that it is in the long-range interest of the law that this Honorable Court should grant the Petition for Certiorari to settle the present conflict in the law.

The present state of the law is that all district attorneys in North Carolina, except those in the Federal Eastern District, are free, and indeed obliged, to commence civil nuisance abatement actions against the purveyors of hard core pornography. In order to prevent such a patently incongruous state of the law in an area as vital as the abatement of pornographic nuisances, Respondent urges this Court to grant the Petition for Certiorari so that the decision of the North Carolina Supreme Court in *Chateau X* would be affirmed and *Fehlhaber*[6] would thereby be overruled.

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[6]The United States Court of Appeals for the Fourth Circuit has stayed further proceedings in *Fehlhaber* pending this Court's disposition of Chateau X's Petition.



## B. The Decision of the North Carolina Supreme court in Chateau X was Correct and the Decision in *Fehlhaber* was in Error.

In *Chateau X,* the North Carolina Supreme Court held that N.C.G.S. §19-5, and the trial court's injunction issued pursuant thereto, were not unconstitutional prior restraints. In doing so, the Court diligently followed the teaching of this Court in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (1957). In *Kingsley Books, Inc.,* Justice Frankfurter, speaking for the Court, observed that "[t]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." 354 U.S. at 441, 1 L.Ed. 2d at 1474, 77 S.Ct. at 1328. The constitutional assessment of an injunction affecting matters of expression requires a more refined analysis. "*What is needed ... is a pragmatic assessment of its* [the statute's] *operation in the particular circumstances.* The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis. 354 U.S. at 442, 1 L.Ed. 2d at 1474, 77 S.Ct. at 1328, *quoting* Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 553, 559 (1951) (emphasis added).

As the North Carolina Supreme Court's opinion in *Chateau X* reveals, the injunction from which the Petitioners are seeking relief is, in effect, nothing more than a personalized criminal statute. No significant procedural differences exist between a §19-5 injunction and the standard criminal statute aimed at

purveyors of pornography. Indeed, the trial court's injunction is restricted to only a subset of what is obscene. Moreover, a Chapter 19 defendant, unlike a defendant in a standard prosecution under criminal pornography laws, is entitled to two chances before he is subject to fine or imprisonment. "Thus, the defendants suffer *less indecision* as to what materials they can deal in under the injunction than they would under a usual criminal obscenity statute." 296 N.C. at 264, 250 S.E. 2d at 611 (1979) (emphasis added).

The Court in *Fehlhaber,* by contrast, neglected to undertake a detailed analysis and pragmatic assessment of the effect of the statute's operation.

The suppression of nuisances injurious to the public health or morality is among the most important duties of government. *Phalen* v. *Virginia,* 49 U.S. 163, 168 (8 How.), 12 L.Ed. 1030, 1033 (1850). The State of North Carolina has, therefore, both the obligation and the right to prevent the creation and proliferation of pornographic nuisances. It cannot be gainsaid that the most effective method compatible with the First Amendment for eradicating pornographic nuisances is to enjoin their perpetuation. In fulfilling important duties of government, the State is entitled to resort to "various weapons in the armory of the law." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441, 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325, 1328 (1957). The State of North Carolina has employed an effective weapon in its war against the corruption of the public health and morality by the purveyors of pornography. The



constitutional assessment of the weapon should, as Justice Cardozo has elsewhere noted, be guided by robust common sense. *See Steward Machine Co.* v. *Davis,* 301 U.S. 548, 590, 81 L.Ed. 1279, 1292, 57 S.Ct. 883, 892 (1937). Neither common sense nor the Constitution is offended by enjoining a person from conducting the pornographic nuisance which he has been maintaining. It is precisely this kind of prohibition which is mandated by N.C.G.S. §19-5.

The mandate of N.C.G.S. §19-5 is not the imposition of classical prior restraint upon the publication of ideas. Classical prior restraint is the requirement that the disseminator of a publication submit his material for governmental scrutiny and approval prior to dispersing the materials. *Near* v. *Minnesota,* 283 U.S. 697, 733-735, 75 L.Ed. 1357, 1376-1377, 51 S.Ct. 625, 637 (1931) (Butler, J.) (dissenting). The paradigm of classical prior restraint is the licensor's system of administrative censorship. *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations,* 413 U.S. 376, 389-390, 37 L.Ed. 2d 669, 679, 93 S.Ct. 2553, 2561, *reh. den.* 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 30 (1973). N.C.G.S. §19-5 contains no licensing requirement; nor does the statute require governmental scrutiny and permission prior to dispersing material. The statute does mandate an injunction which forbids defendants from continuing their pornographic nuisance. However, the defendants subject to the statute are free to disseminate material without prior court authorization. Hence, the statute does not require administrative approval of

material in advance of dissemination such as was exercised by the licensors at common law.

The statute merely imposes a legal duty which is subject to enforcement through the court's contempt powers. A legal duty "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by the judgment of the court." Holmes, *The Path of The Law, 10 Harv. L. Rev.* 457, 461 (1897). Any punishment for violation of the trial court's injunction would merely be the sanction which the State is entitled to employ as a sanction for a defendant's failure to comply with his legal duty. "Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice." *Kingsley Books, Inc.* v. *Brown.* 354 U.S. 436, 441. 1 L.Ed. 2d 1469, 1474, 77 S.Ct. 1325, 1328 (1956) (emphasis in original). Since the imposition of a sanction by the trial court for violation of its injunction would be the imposition of a sanction *subsequent* to the continued maintenance of a pornographic nuisance, the sanction is constitutionally permissible. *Subsequent punishment* for such abuses as may exist *is* the appropriate remedy, consistent with Constitutional privilege." *Near* v. *Minnesota, supra,* 283 U.S. at 720, 75 L.Ed. at 1369, 51 S. Ct. at 632. (Hughes, C.J.) (Majority opinion) (emphasis added).

The instant statute is distinguishable in several important respects from the statute found



unconstitutional in *Near.* The *Near* statute authorized the State of Minnesota to obtain an injunction to suppress the *future* publication of a newspaper without the necessity of proving the falsity of the charges made in the condemned publication. *Near* v. *Minnesota, supra,* 283 U.S. at 709, 75 L.Ed. at 1364, 51 S.Ct. at 629. Indeed, in *Near* the State made no allegation that the matter published was not true. The *Near* statute permitted only the defense that the truth was published with good motives and for justifiable ends. Mere proof of truth was not a sufficient defense under the *Near* statute. The *Near* statute also placed the burden of proof upon the publisher. *Id.,* 283 U.S. at 709-710, 75 L.Ed. at 1364, 51 S.Ct. at 628-629. Finally, and most importantly, the *Near* statute required the publisher to convince the Court *in advance* that any new publication of his did not violate the statute. "Whether he [the publisher] would be permitted *again to publish* matter deemed to be derogatory . . . would depend upon the court's ruling." *Id.,* 283 U.S. at 712, 75 L.Ed at 1365, 51 S.Ct. at 629. (Emphassis added). This, of course, is the essence of censorship. *Id.,* 283 U.S. at 713, 75 L.Ed. at 1366, 51 S.Ct. at 630. None of these heavy handed censorial prior restraints are imposed by the North Carolina Statute. N.C.G.S. §19-5 neither places the burden of proof upon the publisher nor requires the publisher of material to submit the material to the Court for its inspection and approval prior to its dissemination.

In *Near* the court boldly stepped beyond the common law doctrine that genuine prior restraint is the restraint imposed by a system of administrative

censorship. *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations,* 413 U.S. 376, 389-390, 37 L.Ed. 2d 669, 679, 93 S.Ct. 2553, 2561 *reh. den.* 414 U.S. 881, 38 L.Ed. 2d 128, 94 S.Ct. 30 (1973). The teaching of *Near* and its progeny is that some, but not all, injunctions are constitutionally impermissible prior restraints. *See, e.g., Kingsley Books, Inc.* v. *Brown,* 354 U.S. 426, 1 L.Ed. 2d 1469, 77 S.Ct. 1325 (1957). Even if an injunction were a prior restraint, it is not *per se* violative of the Constitution. *See, e.g.., Times Film Corp.* v. *Chicago,* 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391 (1961).

In *Near* v. *Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931), the United States Supreme Court established the principle that prior restraint of obscene publications is constitutionally permissible. Chief Justice Hughes, while observing that the constitutional bar against prior restraint is not absolute, enumerated some of the exceptional cases in which prior restraint is permissible.

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right (Citation omitted)... *On similar grounds, the primary requirements of decency may be enforced against obscene publications. Id.,* 283 U.S. at 716, 75 L.Ed. at 1367, 51 S.Ct. at 631. (emphasis added).



The principle articulated in *Near* permitting prior restraint of obscene materials remains in full force and effect. *See Times Film Corp.* v. *Chicago,* 365 U.S. 43, 49, 5 L.Ed. 2d 403, 407, 81 S.Ct. 391, 394 (1961). Indeed, the principle permitting prior restraint of obscene materials rests upon the proposition that obscenity is not protected by the freedoms of speech and press. *See New York Times Co.* v. *United States,* 403 U.S. 713, 726 & n., 29 L.Ed. 2d 822, 831 & n., 91 S.Ct. 2140, 2147 (1971) (Brennan, J.) (concurring).

The test of whether an injunction is a prior restraint is whether a "communication will be suppressed, either directly or by *inducing excessive caution* in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 390, 37 L.Ed. 2d at 679-680, 93 S.Ct. at 2561 (1973) (emphasis added). N.C.G.S. §19-5 does not suppress any communication in advance of its publication. Hence, the question of whether N.C.G.S. §19-5 is even a "prior restraint" can be answered by determining whether the operation and effect of the statute induces "excessive caution" of expression. Since the trial court's injunction, as well as N.C.G.S. §19-5, does not induce any greater caution of expression than the standard criminal obscenity statute, the injunction is not a "prior restraint" in the constitutional sense of the term.

## CONCLUSION

For the reasons set forth above, Respondent urges that the Writ of Certiorari be issued so that the judgment and opinion of the North Carolina Supreme Court may be reviewed and affirmed.

This the 29th day of May, 1979.

Respectfully submitted,

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# APPENDICES

# Chapter 19.

# Offenses against Public Morals.

## Article 1.

## Abatement of Nuisances.

Sec.

## ARTICLE 1.

*Abatement of Nuisances.*

**§19-1. What are nuisances under this Chapter.** — (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance.

(b) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place wherein or whereon are carried on, conducted, or permitted repeated acts which create and constitute a breach of the peace shall constitute a nuisance.



(c) The building, or place, or vehicle, or the ground itself, in or upon which a nuisance as defined in subsections (a) or (b) above is carried on, and the furniture, fixtures, and contents, are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Pub. Loc. 1913, c. 761, s. 25; 1919, c. 288; C.S., s. 3180; 1949, c. 1164; 1967, c. 142; 1971, c. 655; 1977, c. 819, ss. 1, 2.)

**§ 19-1.1. Definitions.** — As used in this Chapter relating to illegal possession or sale of obscene matter or to the other conduct prohibited in G.S. 19-1(a), the following definitions shall apply:

(1) "Knowledge" or "knowledge of such nuisance" means having knowledge of the contents and character of the patently offensive sexual conduct which appears in the lewd matter, or knowledge of the acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution which occur on the premises.

(2) "Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;
2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;
3. Masochism or sadism; or
4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

(3) "Lewdness" is synonymous with obscenity and shall mean the act of selling, exhibiting or possessing for sale or exhibition lewd matter.

(4) "Matter" means a motion picture film or a publication or both.

(5) "Motion picture film" shall include any:

(a) Film or plate negative;

(b) Film or plate positive;

(c) Film designed to be projected on a screen for exhibition;



(d) Films, glass slides or transparencies, either in negative or positive form, designed for exhibition by projection on a screen;

(e) Video tape or any other medium used to electronically reproduce images on a screen.

(6) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(7) "Place" includes, but is not limited to, any building, structure or places, or any separate part or portion thereof, whether permanent or not, or the ground itself, but excluding a private dwelling place not used for a profit.

(8) "Publication" shall include any book, magazine,pamphlet, illustration, photograph, picture, sound recording, or a motion picture film which is offered for sale or exhibited in a coin-operated machine.

(9) "Sale" means a passing of title or right of possession from a seller to a buyer for valuable consideration, and shall include, but is not limited to, any lease or rental arrangement or other transaction wherein or whereby any valuable consideration is received for the use of, or transfer or possession of, lewd matter. (1977, c. 819, s. 3.)

§ **19-1.2. Types of nuisances.** — The following are declared to be nuisances wherein

obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

**§ 19-1.2. Types of nuisances.** — The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;

(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of



narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur. (1977, c. 819, s. 3.)

**§19-1.3 Personal property as a nuisance; knowledge of nuisance.** — The following are also declared to be nuisances, as personal property used in conducting and maintaining a nuisance under this Chapter.

(1) All moneys paid as admission price to the exhibition of any lewd film found to be a nuisance;

(2) All valuable consideration received for the sale of any lewd publication which is found to be a nuisance;

(3) All money or other valuable consideration received or used in gambling, prostitution, the illegal sale of intoxicating liquors or the illegal sale of substances proscribed under the North Carolina Controlled Substances Act, as well as the furniture and movable contents of a place used in connection with such prohibited conduct.

From and after service of a copy of the notice of hearing of the application for a preliminary injunction, provided for in G.S. 19-2.4 upon the place, or its

manager, or acting manager, or person then in charge, all such parties are deemed to have knowledge of the contents of the restraining order and the use of the place occurring thereafter. Where the circumstantial proof warrants a determination that a person had knowledge of the nuisance prior to such service of process, the court may make such finding. (1977, c. 819, s. 3.)

**§19-1.4. Liability of successive owners for continuing nuisance.** — After notice of a temporary restraining order, preliminary injunction, or permanent injunction, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. (1977, c. 819, s. 3.)

**§ 19-1.5 Abatement does not preclude action.** — The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence. (1977, c. 819, s. 3.)

**§ 19-2.** Repealed by Session Laws 1977, c. 819, s. 4, effective August 1, 1977.

**§ 19-2.1. Action for abatement; injunction.** — Wherever a nuisance is kept, maintained, or exists, as defined in this Article, the Attorney General, district attorney, or any private citizen of the county may maintain a civil action in the name of the State of North Carolina to abate a nuisance under this Chapter, perpetually to enjoin all persons from maintaining the



same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter; provided, however, that no private citizen may maintain such action where the alleged nuisance involves the illegal possession or sale of obscene or lewd matter.

If an action is instituted by a private person, the complainant shall execute a bond prior to the issuance of a restraining order or a temporary injunction, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the temporary restraining order or preliminary injunction ought not to have been granted. The party enjoined shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. No bond shall be required of the prosecuting attorney or the Attorney General, and no action shall be maintained against the public official for his official action. (1977, c. 819, s. 4.)

**§ 19-2.2. Pleadings; jurisdiction; venue; application for preliminary injunction.** — The action, provided for in this Chapter, shall be brought in the superior court of the county in which the property is located. Such action shall be commenced by the filing of a verified complaint alleging the facts constituting the nuisance. After the filing of said complaint, application

for a preliminary injunction may be made to the court in which the action is filed which court shall grant a hearing within 10 days after the filing of said application. (1977, c. 819, s. 4.)

**§ 19-2.3. Temporary order restraining removal of personal property from premises; service; punishment.** — Where such application for a preliminary injunction is made, the court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1 A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon. Nothing herein shall be interpreted to allow the prior restraint of the distribution of any matter or the sale of the stock in trade, but an inventory and full accounting of all business transactions involving alleged obscene or lewd matter thereafter shall be required.

Any person, firm, or corporation enjoined pursuant to this section may file with the court a motion to dissolve any temporary restraining order. Such a motion shall be heard within 24 hours of the time a copy of the motion is served on the complaining party, or on the next day the superior courts are open in the district, whichever is



later. At such hearing the complaining party shall have the burden of showing why the restraining order should be continued.

In the event a temporary restraining order is issued, it may be served in accordance with the provisions of G.S. 1 A-1, Rule 4, or may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by such service under said Rule 4, delivery and posting. The officer serving such temporary restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect. (1977, c. 819, s. 4.)

**§ 19-2.4. Notice of hearing on preliminary injunction; consolidation.** — A copy of the complaint, together with a notice of the time and place of the hearing of the application for a preliminary injunction, shall be served upon the defendant at least five days before such hearing. The place may also be served by posting such papers in the same manner as is provided

for in G.S. 19-2.3 in the case of a temporary restraining order. If the hearing is then continued at the instance of any defendant, the temporary restraining order may be continued as a matter of course until the hearing.

Before or after the commencement of the hearing of an application for a preliminary injunction, the court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be advanced and consolidated with the hearing on the application for the preliminary injunction; provided, however, the defendant shall be entitled to a jury trial if requested. (1977, c. 819, s. 4.)

**§19-2.5. Hearing on the preliminary injunction; issuance.** — If upon hearing, the allegations of the complaint are sustained to the satisfaction of the court, the court shall issue a preliminary injunction restraining the defendant and any other person from continuing the nuisance and effectually enjoining its use thereafter for the purpose of conducting any such nuisance. (1977, c. 819, s. 4.)

**§ 19-3. Priority of action; evidence.** — (a) The action provided for in this Chapter shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions.

(b) In such action, an admission or finding of guilt of any person under the criminal laws against lewdness, assignation, prostitution, gambling, the illegal possession or sale of intoxicating liquors, or the illegal possession or sale of substances proscribed by the North Carolina Controlled Substances Act, at any such place, is admissible for the purpose of proving the existence of said nuisance, and is evidence of such nuisance and of knowledge of, and of acquiescence and participation therein, on the part of the person charged with maintaining said nuisance.



(c) At all hearings upon the merits, evidence of the general reputation of the building or place constituting the alleged nuisance, of the inmates thereof, and of those resorting thereto, is admissible for the purpose of proving the existence of such nuisance. (Pub. Loc. 1913, c. 761, s. 27; 1919, c. 288; C.S., s. 3182; 1971, c. 528, s. 6; 1973, c. 47, s. 2; 1977, c. 819, s. 5.)

**§ 19-4. Violation of injunction; punishment.** — In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment. (Pub. Loc. 1913, c. 761, s. 28; 1919, c. 288; C.S., s. 3183.)

**§ 19-5. Content of final judgment and order.** — If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of

abatement shall be entered as a part of the judgment in the case, which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State. Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited. (Pub. Loc. 1913, c. 761, s. 29; 1919, c. 288; C.S., s. 3184; 1977, c. 819, s. 6.)

**§ 19-6. Civil penalty; forfeiture; accounting; lien as to expenses of abatement; invalidation of**



**lease.** — Lewd matter is contraband, and there are no property rights therein. All personal property, including all money and other considerations, declared to be a nuisance under the provisions of G.S. 19-1.3 and other sections of this Article, are subject to forfeiture to the local government and are recoverable as damages in the county wherein such matter is sold, exhibited or otherwise used. Such property including moneys may be traced to and shall be recoverable from persons who, under G.S. 19-2.4, have knowledge of the nuisance at the time such moneys are received by them.

Upon judgment against the defendant or defendants in legal proceedings brought pursuant to this Article, an accounting shall be made by such defendant or defendants of all moneys received by them which have been declared to be a nuisance under this Article. An amount equal to the sum of all moneys estimated to have been taken in as gross income from such unlawful commercial activity shall be forfeited to the general funds of the city and country governments wherein such activity took place, to be shared equally, as a forfeiture of the fruits of an unlawful enterprise, and as partial restitution for damages done to the public welfare; provided, however, that no provision of this Article shall authorize the recovery of any moneys or gross income received from the sale of any book, magazine, or exhibition of any motion picture prior to the issuance of a preliminary injunction. Where the action is brought pursuant to this Article, special injury need not be proven, and the costs of abatement are a lien on both the real and personal property used in

maintaining the nuisance. Costs of abatement include, but are not limited to, reasonable attorney's fees and court costs.

If it is judicially found after an adversary hearing pursuant to this Article that a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, prostitution, gambling, sale or possession of illegal intoxicating liquors or substances proscribed under the North Carolina Controlled Substances Act, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner. (Pub. Loc. 1913, c. 761, s. 30; 1919, c. 288; C.S., s. 3185; 1977, c. 819, s. 7.)

**§19-7. How order of abatement may be canceled.** — If the owner appears and pays all cost of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk of the superior court, conditioned that he will immediately abate said nuisance, and prevent the same from being established or kept within a period of one year thereafter, the court may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as same may relate to said property; and if the proceeding be a civil action, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of



the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (Pub. Loc. 1913, c. 761, s. 31; 1919, c. 288; C.S., s. 3186.)

**§19-8. Costs.** — The prevailing party shall be entitled to his costs. The court shall tax as part of the costs in any action brought hereunder such fee for the attorney prosecuting or defending the action or proceedings as may in the court's discretion be reasonable remuneration for the services performed by such attorney. (Pub. Loc. 1913, c. 761, s. 32; 1919, c. 288; C.S., s. 3187; 1977, c. 819, s. 8.)

**§ 19-8.1. Immunity.** — The provisions of any criminal statutes with respect to the exhibition of, or the possession with the intent to exhibit, any obscene film shall not apply to a motion picture projectionist, usher, or ticket taker acting within the scope of his employment, provided that such projectionist, usher, or ticket taker: (i) Has no financial interest in the place wherein he is so employed, and (ii) freely and willingly gives testimony regarding such employment in any judicial proceedings brought under this Chapter, including pretrial discovery proceedings incident thereto, when and if such is requested, and upon being granted immunity by the trial judge sitting in such matters. (1977, c. 819, s. 9.)

**§ 19-8.2. Right of entry.** — Authorized representatives of the Commission for Health Services, any local health department or the Department of Human Resources, upon presenting appropriate credentials to the owner, operator, or agent in charge of

a place described in G.S. 19-1.2, are authorized to enter without delay and at any resonable time and such place in order to inspect and investigate during the regular hours of operation of such place. (1977, c. 819, s. 9.)

§ **19-8.3. Severability.** — If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid. (1977, c. 819, s. 10.)



JUDGMENT

This cause being heard before the undersigned Judge Presiding at the January 4, 1978, session of Superior Court of Onslow County, which session and the trial of this action were extended by Order entered January 5, 1978, and it appearing to the Court that:

1. Service was obtained upon Chateau X, Inc.; Victor Stroop; ATLA Theaters, Inc.; Chateau X Theater and Bookstore; Hector Riquelme, Jr.; Joe Hornsby; Robert J. Smith; Susan Rupe; Frederick Ollie Byrom; Jimmie Tucker Hill; George A. Johnson; Albert Peloquin, and said parties are before the Court and subject to its jurisdiction.

2. At the trial the defendants Chateau X, Inc., James Russ, Albert Peloquin, Hector Riquelme, Jr., Frederick Ollie Byrom, Susan Pupe, Victor Stroop, Joe Hornsby and Robert Jerome Smith appeared through their attorneys Edward G. Bailey and Arthur M. Schwartz, and said parties are before the court and subject to its jurisdiction. It is stipulated by counsel for the plaintiff and the defendants that Jimmie Tucker Hill and ATLA Theaters, Inc., are before the Court and subject to its jurisdiction.

3. Counsel for the Plaintiff and Defendants stipulated that a trial by jury was waived, and that the Court would receive the evidence and determine the

facts from the evidence presented, make its conclusions of law based upon such findings of fact, and enter its judgment.

4. The Complaint and Answer filed in this action establish the following facts:

a. This action is brought by the State of North Carolina through the District Attorney for the Fourth Judicial District pursuant to Chapter 19 of the North Carolina General Statutes.

b. The defendant, Chateau X, Inc., is a corporation organized under the laws of the State of South Carolina and authorized to do business in the State of North Carolina. (Whenever the Court uses "Chateau X, Inc." hereafter, it is referring to said corporation.)

c. The registered office of the defendant Chateau X, Inc., is 409 Coleman Blvd., Mount Pleasant, South Carolina 29414; the registered agent at such address is James Russ; the registered office in North Carolina of the defendant Chateau X, Inc., is Highway 17 South, Jacksonville, North Carolina; and the registered agent at such address is George Johnson.

d. James Russ is a resident of South Carolina, and is an officer and managing agent of the defendant Chateau X, Inc.



e. Albert Peloquin is a resident of South Carolina.

f. The defendants Hector Riquelme, Jr., Susan Rupe, Victor Stroop, Jimmie Tucker Hill, Denise Terry Lamb, George Johnson, Joe Hornsby and Robert Jerome Smith are residents of Onslow County, North Carolina, and the defendant Frederick Ollie Byrom is a resident of Cumberland County, North Carolina.

g. Since August 1, 1977, and for some time prior thereto the defendant Chateau X, Inc., has engaged in the business of the sale of books, films and magazines to the public, and the exhibition of films to the public doing business as Chateau X Theater and Bookstore, Highway 17 South, Jacksonville, Onslow County, North Carolina. (Whenever the Court uses "Chateau X Theater and Bookstore" hereafter, it is referring to said place of business.)

h. The defendant Riquelme, Jr. is employed as manager and managing agent of the defendant Chateau X, Inc., doing business as Chateau X Theater and Bookstore, and as such is engaged at said place in the sale of books, films and magazines to the public, and the exhibition of films to the public at said place, and has been so engaged since November 4, 1977.

i. The defendant Byrom is employed as a managing agent of Chateau X, Inc., doing business

as Chateau X Theater and Bookstore, and as such is engaged at said place in the sale of books, films and magazines to the public and the exhibition of films to the public at said place, and has been so engaged since November 13, 1977.

j. The defendants Rupe, Stroop, Hill and Lamb are employed by the Chateau X, Inc., at the said Chateau X Theater and Bookstore, and as such employees are engaged at said place n the sale of books, films and magazines to the public, and the exhibition of films to the public at said place, the defendant Rupe having been so engaged since August 1, 1977, and the defendants Stroop, Hill and Lamb having been so engaged since November 28, 1977.

k. The defendants Johnson and Hornsby between August 1, 1977, and November 14, 1977, were employed by the defendant Chateau X, Inc. at said Chateau X Theater and Bookstore, and as such employees were engaged at said place in the sale of books, films and magazines to the public, and the exhibition of films to the public at said place.

l. The defendant Smith between August 1, 1977, and November 23, 1977, was employed by the defendant Chateau X, Inc. at the said Chateau X Theater and Bookstore, and as such employee was engaged at said place in the sale of books, films and magazines to the public, and in the exhibition of films to the public at said place.



From the evidence presented during the course of the trial the Court finds as a fact beyond a reasonable doubt that:

5. The defendant ATLA Theaters, Inc., is a corporation organized under the laws of South Carolina having a registered office at 4286 Leventis Road, Charleston, South Carolina, and the registered agent at such address is James Russ. The corporation is not authorized to do business in the State of North Carolina.

6. The defendants Peloquin and Russ are officers of the defendant Chateau X, Inc.

7. From September 8, 1975, through November 15, 1977, electrical power was furnished to Chateau X Theater and Bookstore, in the name of ATLA Theaters, Inc., c/o Albert Peloquin, P.O. Box 8353, Charleston, South Carolina 29407, and from November 15, 1977 until the present electrical power was furnished to the said Chateau X Theater and Bookstore in the name of Frederick Byrom, Chateau X Inc., 555 Cimarron Drive, Fayetteville, North Carolina. This power was furnished by Jones-Onslow Electric Membership Corporation.

8. Between November 4, 1977 and November 10, 1977 State's Exhibit Number 10, "Married Women" and State's Exhibit Number 11, "Story of Louis" were the only films that were exhibited at Chateau X Theater and Bookstore.

9. Between November 11, 1977 and November 15, 1977 the only films that were exhibited at Chateau X

Theater and Bookstore were State's Exhibit Number 12 entitled "Make Mine Milk" and State's Exhibit Number 13, "Baroness Nica".

10. Between November 15, 1977 and November 21, 1977 the only films shown at Chateau X Theater and Bookstore were State's Exhibit Number 14 entitled "Secret Fantasies", and State's Exhibit Number 15 entitled "Airline Cockpit", and State's Exhibit Number 16 entitled "Guess Whom Cum" and "Monster From the Blue Lagoon".

11. Between November 22, 1977 and November 28, 1977 the only films shown at Chateau X Theater and Bookstore were State's Exhibit Number 17 entitled "Unholy Child" and State's Exhibit Number 18, "Message Alone", and State's Exhibit Number 19-A and 19-B, "Count Erotica". (State's Exhibit 19 consists of two reels, 19-A and 19-B).

12. State's Exhibits numbered 10 through 14 and State's Exhibits numbered 16 through 19-A and 19-B contain substantially similar material as is contained in State's Exhibit Number 15, which was exhibited to the Court.

13. State's Exhibits numbered 1, 4, 5, 6 and 8 contain substantially similar material as is contained in State's Exhibit Number 3, which was shown to the Court.

14. State's Exhibits numbered 2, 7 and 9 contain substantially similar material as is contained in State's Exhibit Number 15.



15. State's Exhibits numbered 1 through 9 were purchased by SBI agents at Chateau X Theater and Bookstore during the period between November 4, 1977 and November 28, 1977.

16. Two of the films contained in State's Exhibits numbered 10 through 19-A and 19-B portray acts of masochism and sadism.

17. State's Exhibit 20 is an inventory of material found by Deputy Sheriff Kenneth W. Cooper at the Chateau X Theater and Bookstore, on December 12, 1977. The films listed on State's Exhibit 20 contain substantially similar material as is contained in State's Exhibit Number 15. The books and magazines listed on State's Exhibit 20 contain substantially similar material as is contained in State's Exhibit Number 3.

18. The motion picture films exhibited or distributed at Chateau X Theater and Bookstore were exhibited or distributed to consenting adults, and the books sold and distributed were sold and distributed to consenting adults within the community of the State of North Carolina.

19. State's Exhibits numbered 1 through 24 were received in evidence.

20. State's Exhibit Number 15 entitled "Airline Cockpit" is a motion picture film of four young adult females occupying an apartment, three of whom go out to find male companions while the fourth remains in the

apartment reading a book of poetry. During the course of the film each of her companions returns with a young male adult and goes into a separate room where she and her companion engage in various acts of sexual intercourse generally including normal intercourse, fellatio (female's oral stimulation of the male's penis), cunnilingus (male's oral stimulation of the female's vulva or clitoris), and anal sodomy. There are numerous scenes in which the viewer's attention is focused on enlarged exhibits of the genitals of both the male and female engaged in various acts of sexual intercourse for extended periods of time. On occasions the male is shown ejaculating on the face, body and mouth of his female partner. Throughout the film the fourth female is shown as fantasizing that she is replacing one of the other females in engaging in the various acts of sexual intercourse. The film concludes with a lesbian scene in which two females engage in oral sexual intercourse and then are joined by two males engaging the females in various acts of sexual intercourse and then exchanging female partners.

21. State's Exhibit 15 is approximately 45 minutes in duration. From the beginning until its end, it is a filthy, cynical, disgusting portrayal of explicit sexual activity. There is not word, scene or suggestion of the romantic, sentimental, poetic or spiritual aspect of any sex relation, and the scenes so exhibited on the screen utterly fail to show even bawdy sex, or comic sex, or sex described with vulgar humor. There is no glory, no beauty, no humor, no art. It is just mud. The whole film is "sick sexuality", a deliberate, studied, exercise in the



depiction of sex relations, sexual deviations, and sexual perversions. It is debasing, filthy and revolting.

22. There are valid, compelling reasons to restrain and enjoin the exhibition of this product and all like it.

23. State's Exhibit Number 3, a magazine entitled SPREAD YOUR LEGS, contains on its front and back covers enlarged color photographs of the male and female genitals while engaged in intercourse. Throughout the magazine are color photographs showing persons engaged in various acts of sexual intercourse including acts of sodomy, per os, and per anum. The whole magazine is "sick sexuality", a deliberate study in the depiction of perverted sexual relations and sexual deviations; and , it is debasing, filthy and revolting.

24. There are valid and compelling reasons to restrain and enjoin the exhibition and sale of this product and all like it.

25. State's Exhibit 3, the magazine and State's Exhibit 15, the film, and each of them, contains and depicts (2) patently offensive representations of ultimate sex acts and perverted sexual acts, and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals.

26. When taken as a whole by the average person applying contemporary community standards, he would find that State's Exhibit 3, and State's Exhibit 15,

and each of them (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educational, political, or scientific value.

27. State's Exhibit 3, and State's Exhibit 15 and each of them is lewd, obscene, and a nuisance.

28. State's exhibit 20 contains an inventory of all motion picture films situate at the Chateau X Theater and Bookstore and each film contains substantially similar material to that contained in State's Exhibit 15. Each film contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. When taken as a whole by the average person applying contemporary community standards, he would find that each film (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary artistic, educational, political, or scientific value. Each film is lewd, obscene and a nuisance.

29. State's Exhibit 20 contains an inventory of all books, magazines and papers situate at the Chateau X Theater and Bookstore and each book, magazine and paper contains substantially similar material to that contained in State's Exhibit 3. Each book, paper and magazine, contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts and (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. Each



book, paper and magazine when taken as a whole by the average person applying contemporary community standards, he would find that each book, amgazine and paper (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educational, political or scientific value. Each book, paper and magazine is lewd, obscene and a nuisance.

29a. The films identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19-A and 19-B contained substantially similar material to that contained in State's Exhibit 15. Each film contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. When taken as a whole by the average person applying contemporary community standards, he would find that each film (a) appeals to the prurient interest in sex (b) portrays sexual conduct in a patently offensive way, and (c) totally lacks serious literary, artistic, educations, political or scientific value. Each film is lewd, obscene and a nuisance.

29b. The magazines identified as State's Exhibits 1, 4, 5, 6 and 8 contains substantially similar material to that contained in State's Exhibit 3, Each magazine contains and depicts (a) patently offensive representations of ultimate sex acts and perverted sexual acts, (b) patently offensive representations of masturbation and lewd exhibitions of the genitals. Each

magazine when taken as a whole by the average person applying contemporary community standards, he would find that each magazine (a) appeals to the prurient interest in sex, (b) portrays sexual conduct in a patently offensive way and (c) totally lacks serious literary, artistic, educational, political or scientific value. Each magazine is lewd, obscene and a nuisance.

30. Other articles found upon the premises and itemized in the inventory of State's Exhibit 20 include lotion, potions, pills, powders, and erotic devices designed to appeal to an individuals prurient interest in sex and are lewd.

31. Throughout the evidence presented to the Court the theme stated and restated is depravity and perversion repugnant to good conscience and detrimental to public health and morals.

32. None of the defendants make an attempt to justify any of the filth confiscated as a work redeemable by claiming artistic value, educational value, political value, or scientific worth. None of the defendants attempt to present a case or a hypothetical situation wherein the films, magazines, or other lewd material might have some semblance of social value, or even a modicum of artistic, literary, scientific, education or other merit to be considered for justification of its exhibition or sale. The defendants stand firm upon their supposed constitutional right to knowingly show obscene films and other lewd publications for profit, or to sell such for profit, all of which are utterly without redeeming social importance or value and constitute



lewd and obscene, hard core pornography. The defendants contend that this court is utterly powerless to enjoin such future conduct.

33. During the period from November 4, 1977, to December 12, 1977, Chateau X, Inc. possessed at its place of business the Chateau X Theater and Bookstore for the purpose of public exhibition at such place of business lewd and obscene motion picture films in the regular course of its business, and the public exhibition and sale of said films were a predominant and regular course of the business. During the said period of time lewd and obscene films were publicly and repeatedly exhibited and possessed for the purpose of public and repeated exhibition at the Chateau X Theater and Bookstore.

34. The defendant Chateau X, Inc. maintained as a principal and substantial part of its stock in trade at its place of business at Chateau X Theater and Bookstore lewd and obscene publications consisting of magazines, books, newspapers, and films.

35. All defendant employees of Chateau X, Inc. working at the place of business at Chateau X Theater and Bookstore had knowledge of its principal business, had knowledge of its predominant business, and had knowledge that the principal and substantial part of the stock in trade maintained by the defendant Chateau X, Inc. at said place of business was lewd and obscene motion picture films and publications consisting of magazines, books, and newspapers and that the same were possessed for public exhibition and sale.

36. All defendant officers of the defendant, Chateau X, Inc. had knowledge that the predominant and regular course of business conducted by Chateau X, Inc. upon the premises at Chateau X, Theater and Bookstore was the public exhibition of lewd and obscene films and that lewd and obscene publications consisting of magazines, books, papers and films constituted a principal and substantial part of the stock in trade of said defendant at said place of business.

37. The defendant officer and employees had knowledge of the facts found in paragraphs 35 and 36 because each would testify that all distributions and exhibitions were made to consenting adults within North Carolina.

38. The defendant Chateau X, Inc., through its officers, agents, and employees establish, maintain and use the building and premises situate at Chateau X Theater and Bookstore for the purpose of illegal possession for sale, sale, and public exhibition of lewd and obscene matter and thereby did establish, continue and maintain a nuisance upon said premises.

39. The defendants, over an extended period of time consisting of five (5) weeks sold, distributed, and publicly exhibited lewd and obscene, hardcore pornographic motion picture films, magazines, books, and papers at Chateau X Theater and Bookstore.

40. Without stipulating that any of the foregoing findings of fact are based upon evidence presented to



the Court, it is stipulated by counsel for the Plaintiff and the Defendant that none of the writing or written material contained in State's Exhibits 1 through 19-A and 19-B and contained in any of the items listed in State's Exhibit 20, if considered by the Court would alter the findings of the Court based upon the evidence presented during the trial.

41. That the Chateau X Theater and Bookstore is a theater and motion picture establishment which in the regular, predominant and ordinary course of its business shows and demonstrates lewd and obscene films and motion pictures.

42. That State's Exhibits 10-19 A&B are lewd films which were publicly exhibited and possessed for the purpose of public exhibition by the Defendants at the Chateau X Theater and Bookstore so as to constitute the said films a nuisance.

43. That the Chateau X Theater and Bookstore is a place used by the Defendants for the purpose of selling, exhibiting or possessing for the purpose of sale or exhibition lewd and obscene publication in the regular course of business.

UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

a. Implicit in the history of the first amendment to the United States Constitution is the rejection of

obscenity as it is without redeeming social importance or value. Sex and obscenity are not synonymous. Obscenity is not protected by Freedom of Speech or Freedom of the Press. *Roth* v. *U.S.*, 354 US 476 (1957).

b. Legislation enacted in the exercise of police power for the benefit of the public is as extensive as may be required for the protection of the publics health, safety, morals, and general welfare of the people. *State Ex Rel. Taylor* v. *Racing Assn.*, 241 NC 80 (1954).

c. The State's ability to regulate the dissemination of obscene materials is settled beyond dispute. *Miller* v. *California* 413 US 15 (1973). The choice of a civil nuisance procedure as the regulatory means is permissible, *Kingsly Books, Inc.* v. *Brown*, 354 US 436 (1957).

d. The second paragraph of North Carolina General Statute, Section 19-5 reads: "Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance." The United States Supreme Court has repeatedly declared provisions such as this unconstitutional whenever there is an attempt to infringe upon the Freedoms of Speech and Press by an injunction enjoining future publications. In regulating the illegal possession or sale of obscene or lewd matter as defined by Chapter 19 of the N.C. General Statute, this provision is unconstitutional. It is ineffectual in



actions to regulate the illegal possession or sale of obscene or lewd matter; and pursuant to GS 19-8.3, it shall not affect the remaining portions of Chapter 19.

e. This Court may not enjoin the defendants from the future sale, distribution, possession, and exhibition of all movies, magazines, and books without regard to their contents; but, it is unwilling to hold that there is not a method which can be found to stop conduct of parties such as shown by this record.

f. When taken individually and as a whole, the lewd and obscene matter is a portrayal of sexual conduct in a patently offensive way without serious literary, artistic, educational, political or scientific value, and its only appeal is to the prurient interest in sex, and it is utterly without redeeming social importance and constitutes hard core pornography.

g. It is within the power of the judiciary to enjoin the continued sale and display of hard core pornography. *Miller* v. *California*, 413 US 15, 37 L Ed, 2d 419, 93 S Ct 2607 (1973). If this Court limits its injunction to a particular item by describing each title, it would require the State to bring suit each time the defendants change the obscene menu in the passion pit, thereby rendering it impossible for the State to enforce its prohibition against the illegal possession or sale of obscene and lewd matter.

h. The film State's Exhibit 15, is lewd, obscene and a nuisance.

i. The films identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19-A and 19-B are lewd, obscene, and a nuisance.

j. All films inventoried in State's Exhibit 20 are lewd, obscene and a nuisance.

k. The magazine, State's Exhibit 3, is lewd, obscene, and a nuisance.

l. The magazines identified as State's Exhibits 1, 4, 5, 6 and 8 are lewd, obscene and a nuisance.

m. The magazines, books, and papers inventoried in State's Exhibit 20 are lewd, obscene, and a nuisance.

n. All materials substantially similar to the film identified as State's Exhibits 2, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19-A and 19-B and all materials substantially similar to the books, magazines, and papers identified as State's Exhibits 1, 3, 4, 5, 6 and 8 and all films, books, magazines, and papers substantially similar to those included in the inventory contained in State's Exhibit 20 are lewd and obscene and constitute a nuisance. The illegal possession for sale and public exhibition thereof as provided by Chapter 19 of the N.C. General Statute constitutes a nuisance.



o. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin and Russ maintained at the Chateau X Theater and Bookstore, a place of business where lewd films were publicly exhibited as a predominant and regular course of business and the same constitutes a nuisance.

p. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ maintained a place of business at the Chateau X Theater and Bookstore where they possessed for the purpose of public exhibition as a predominant and regular course of business lewd films and the same constitutes a nuisance.

q. Every lewd film identified as State's Exhibits 2, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19-A and 19-B was possessed at the Chateau X Theater and Bookstore by the defendant for the purpose of repeated public exhibition and constitutes a nuisance. (And all those listed in the inventory in State's Exhibit 20.)

r. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ maintained a business at Chateau X, Theater and Bookstore where lewd publications constituted a principal or substantial part of the stock in trade and the same constitutes a nuisance.

s. All the publications identified as State's Exhibits 1, 3, 4, 5, 6 and 8 and all lewd books, papers, and magazines inventoried on State's Exhibit 20 constitute a principal and substantial part of the stock in trade of the place of business at the Chateau X Theater and Bookstore and the same are a nuisance.

t. All lewd and obscene films containing matters which is substantially similar to that contained in State's Exhibits 2, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19A and 19-B and containing matter which is substantially similar to the lewd and obscene films inventoried in State's Exhibit 20 are lewd, obscene and constitute a nuisance when possessed for the purpose of public exhibition in the predominant and regular course of business.

u. All lewd and obscene publications of books, magazines, and papers containing material substantially similar to that contained in State's Exhibits 1, 3, 4, 5, 6 and 8 and containing material substantially similar to the books, papers and magazines inventoried in State's Exhibit 20 are lewd and obscene and constitute a nuisance when possessed for sale as a principal and substantial part of the stock in trade of a place of business.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that:

1. All lewd matter consisting of films, books, magazines and papers and copies thereof, in the



possession of the defendants, or situate at the Chateau X Theater and Bookstore, identified as State's Exhibit 1 through 19 and listed on the inventory State's Exhibit 20 be seized by Sheriff of Onslow County and the same are hereby confiscated. The Sheriff of Onslow County is directed to destroy the same.

2. The defendants, Chateau X, Inc., Riquelme, Byrom, Rupe, Stroop, Hill, Lamb, Johnson, Hornsby, Smith, ATLA Theaters, Inc., Peloquin, and Russ and each of them be, and they are hereby enjoined and restrained from:

a. possessing, selling or possessing for sale, the lewd matter, or copies thereof, identified as:

State's Exhibit 1, a magazine entitled SAVAGE SEX
State's Exhibit 2, a film entitled "Quadro Sex Pro"
State's Exhibit 3, a magazine entitled SPREAD YOUR LEGS
State's Exhibit 4, a magazine entitled ABDUCTION
State's Exhibit 5, a magazine entitled EASY CUM
State's Exhibit 6, a magazine entitled YOUNG & TENDER
State's Exhibit 7, a film entitled "Babe"
State's Exhibit 8, a magazine entitled HIPPIE SEX
State's Exhibit 9, a film entitled "Lusty Girls"
State's Exhibit 10, a film entitled "Married Women"
State's Exhibit 11, a film entitled "Story of Louis"
State's Exhibit 12, a film entitled "Make Mine Milk"
State-s Exhibit 13, a film entitled "Baroness Nica"
State-s Exhibit 14, a film entitled "Secret Fantasies"
State's Exhibit 15, a film entitled "Airline Cockpit"

State's Exhibit 16, a film entitled "Guess Whom Cum" and "Monster From the Blue Lagoon"
State's Exhibit 17, a film entitled "Unholy Child"
State's Exhibit 18, a film entitled "Massage Alone"
State's Exhibit 19-A & 19-B, a film entitled "Count Erotica"

b. Possessing, selling or possessing for sale, the lewd matter consisting of films, magazines, books and papers, or copies thereof, listed on the inventory in State's Exhibit 20, a copy of which is attached hereto and made a part thereof to the same extent as if herein set out verbatim.

c. Exhibiting or possessing for exhibition to the public the lewd films or copies thereof, included in the State's Exhibits or listed on the inventory of State's Exhibit 20.

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum,

(2) [Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or]
PLAINTIFF'S EXCEPTION NO. 1



(3) Persons engaging in masturbation.
DEFENDANTS' EXCEPTION NO. 2

e. [Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade]
PLAINTIFF'S EXCEPTION NO. 2

at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum

(2) [Enlarged Exhibits of the genitals of male and female persons during acts of sexual intercourse, or]
PLAINTIFF'S EXCEPTION NO. 3

(3) Persons engaging in masturbation
DEFENDANTS' EXCEPTION NO. 3

The Sheriff of Onslow County shall forthwith post a copy of this notice at all doors entering the Chateau X Theater and Bookstore and all persons are hereby notified that the removal, defacing, or destruction of any part of this judgment so posted including the attached copy of State's Exhibit 20, shall be an act in contempt of Court and shall subject said persons to punishment for Contempt of Court.

4. All persons going upon the premises of the Chateau X Theater and Bookstore and while on said premises shall be, and they are hereby enjoined and restrained from:

a. Selling or possessing for sale, the lewd matter, or copies thereof, identified as:

State's Exhibit 1, a magazine entitled SAVAGE SEX
State's Exhibit 2, a film entitled "Quadro Sex Pro"
State's Exhibit 3, a magazine entitled SPREAD YOUR LEGS
State's Exhibit 4, a magazine entitled ABDUCTION
State's Exhibit 5, a magazine entitled EASY CUM
State's Exhibit 6, a magazine entitled YOUNG & TENDER
State's Exhibit 7, a film entitled "Babe"
State's Exhibit 8, a magazine entitled HIPPIE SEX
State's Exhibit 9, a film entitled "Lusty Girls"
State's Exhibit 10, a film entitled "Married Women"
State's Exhibit 11, a film entitled "Story of Louis"
State's Exhibit 12, a film entitled "Make Mine Milk"
State's Exhibit 13, a film entitled "Baroness Nica"
State's Exhibit 14, a film entitled "Secret Fantasies"
State's Exhibit 15, a film entitled "Airline Cockpit"
State's Exhibit 16, a film entitled "Guess Whom Cum" and "Monster From the Blue Lagoon"
State's Exhibit 17, a film entitled "Unholy Child"
State's Exhibit 18, a film entitled "Massage Alone"
State's Exhibit 19-A & 19-B, a film entitled "Count Erotica"



b. Selling or posssessing for sale, the lewd matter consisting of films, magazines, books and papers, or copies thereof, listed on the inventory in State's Exhibit 20, a copy of which is attached hereto and made a part hereof to the same extent as if herein set out verbatim.

c. Exhibiting or possessing for exhibition to the public the lewd films or copies thereof, included in the State's Exhibits or listed on the inventory of State's Exhibit 20.

d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:

(1) Persons engaging in sodomy, per os, or per anum

(2) [Enlarged exhibits of the genitals of male and female persons during act of sexual intercourse, or]
PLAINTIFF'S EXCEPTION NO. 4

(3) Persons engaging in masturbation.
DEFENDANTS' EXCEPTION NO. 4

e. [Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade]
PLAINTIFF'S EXCEPTION NO. 5

at a place of business consisting of magazines, books, and papers which appears to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:

(1) Persons engaged in sodomy, per os, or per anum,

(2) [Enlarged Exhibits of the genitals of male and female persons during acts of sexual intercourse, or]
PLAINTIFF'S EXCEPTION NO. 6

(3) Persons engaging in masturbation.
DEFENDANTS' EXCEPTION NO. 5

5. The costs of this action are taxed against the Defendants.

This the 13th day of January, 1978.

s/HERBERT SMALL

Judge Presiding

## CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Brief of Respondent in Response to Petition for Writ of Certiorari to the Supreme Court of North Carolina were served this day on Arthur M. Schwartz, P.C. and Bailey, Raynor & Erwin, by depositing three (3) copies of the same in the United States mail, postage prepaid, addressed to:

Arthur M. Schwartz, P.C.
1650 Market Street
Denver, Colorado 80202

Bailey, Raynor & Erwin
323 New Bridge Street,
Jacksonville, North Carolina 28540

This the 29th day of May, 1979.

RUFUS L. EDMISTEN
Attorney General

MARVIN SCHILLER
Assistant Attorney General